IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1686

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on October 19, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 539 F.2d 554 and reprinted in Appendix A. The Decision and Order of the National Labor Relations

Board, including the Decision of the Administrative Law Judge, are reported at 219 N.L.R.B. 26 and reprinted in Appendix D.

JURISDICTION

The judgment of the Court of Appeals (Appendix B) was entered on October 19, 1976, and petitioner's timely petition for rehearing was denied on February 3, 1977 (Appendix C). By an order dated April 25, 1977, Mr. Justice Powell extended the time for filing a petition for certiorari to and including June 1, 1977. This Court's jurisdiction to review the judgment below is based on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Section 8(b)(1)(B) of the National Labor Relations Act prohibits picketing or other concerted activities engaged in by a union composed almost entirely (97%) of supervisors, where such activities are intended *solely* to advance the interests of the union's supervisory membership, and the union neither represents nor seeks to represent the non-supervisory employees of the employer involved.

2. Whether, if Section 8(b)(1)(B) is applicable in such circumstances at all, it prohibits the union not only from picketing to compel the employer to hire one group of supervisors rather than another, but also from picketing for such normal and legitimate collective bargaining objectives as obtaining recognition, obtaining a collective bargaining agreement, and obtaining adherence to the terms and conditions of employment which prevail under the union's contracts with other employers.

STATUTES INVOLVED

Section 2 of the National Labor Relations Act, as amended, 29 U.S.C. § 152, provides in pertinent part as follows:

> "When used in this Act—
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> "(3) The term 'employee' shall include any employee, . . . but shall not include . . . any individual employed as a supervisor. . . .
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> "(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.
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> * * * *
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> "(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Section 8(b)(1)(B) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(1)(B), provides as follows:

> "It shall be an unfair labor practice for a labor organization or its agents—
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> * * * *

"(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; . . ."

Section 14(a) of the National Labor Relations Act, as amended, 29 U.S.C. § 164(a), provides as follows:

"Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

STATEMENT OF THE CASE

Background

The International Organization of Masters, Mates and Pilots (hereinafter referred to as MMP) has been since 1887 the principal trade union representing the licensed deck officers (i.e., masters, mates and pilots) of the United States merchant marine. It is undisputed that such deck officers are "supervisors" within the meaning of the National Labor Relations Act.[1] MMP's membership also includes a small number of "employees" as defined in the Act (approximately 250, or three percent of its total membership of approxi-

[1] Although "supervisors" do not enjoy the statutory protections which are afforded to "employees" by the National Labor Relations Act, the Act has never been construed as prohibiting them from forming or joining labor unions, bargaining collectively, or engaging in other concerted activities. (See pp. 19-20, *infra*.) In the maritime industry, collective bargaining by supervisors is a long-standing practice. Not only licensed deck officers but also licensed engineers, who are also supervisors, have for decades been organized into unions and covered by collective agreements.

mately 8,500), principally deckhands or cooks on small vessels such as tugboats or ferries. MMP does not, however, either represent or seek to represent any "employees" on large ocean-going vessels of the type involved in this case. It represents only licensed deck officers on such vessels.

MMP bargains on an industry-wide basis with over 100 shipping companies which operate approximately 300 ocean-going vessels. Its standard collective bargaining agreement provides, among other things, that the employers will hire only MMP members as deck officers, and will maintain a minimum deck-officer complement of a master and four mates. In addition, the agreement contains detailed provisions relating to wages, fringe benefits, hours of work, vacations, holidays, job duties, living conditions aboard ship, and numerous other matters.

In recent years, the labor standards established in MMP contracts and the job opportunities of its members have been placed in jeopardy by the activities of another union, Marine Engineers Beneficial Association (MEBA). Historically, MEBA represented only licensed engineers, but in recent years it has attempted to negotiate collective bargaining agreements covering licensed deck officers as well. MEBA has been particularly active in seeking to obtain such contracts with the operators of the new generation of ships currently being built under government subsidy programs. These new ships, which are vastly superior in size, speed, and cargo capacity to older models, will undoubtedly eventually replace many of the older vessels. To induce employers to contract with it rather than with MMP with respect to deck officers, MEBA offers

terms which undercut MMP's standards. For example, while MMP contracts have long required a deck-officer complement of a master and four mates, MEBA agrees to accept a master and three mates. In addition, MEBA's contracts frequently undercut MMP's wage standards.

These activities by MEBA are a matter of grave concern to MMP. To the extent that MEBA succeeds in obtaining contracts covering licensed deck officers on new vessels, the employment opportunities of MMP's members are diminished, since collective agreements in this industry typically provide that the employer will hire only members of the contracting union.[2] Moreover, to the extent that MEBA's contracts provide for lower labor standards, they place MMP's employers at a competitive disadvantage, and cause them to put pressure on MMP to reduce its own standards in order to enable those employers to compete effectively. For example, the evidence in this case indicated that MMP is already being pressured by some employers to reduce its manning standard in order to enable them to compete with MEBA employers.

In order to combat this threat to the job opportunities of its members and the labor standards which it has established through years of collective bargaining, MMP has resorted to labor's traditional weapon, the picket line. That is what led to the present case.

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[2] Since licensed deck officers are "supervisors" rather than "employees" under the National Labor Relations Act, a contractual requirement that the employer hire only union members for such positions is not unlawful. The statutory prohibition against discrimination on the basis of union membership, § 8(a)(3), 29 U.S.C. § 158(a)(3), applies only to "employees."

The Events Which Gave Rise to the Present Case

This case involves two new vessels, the M/V Ultramar and M/V Sugar Islander, both of which were launched in the summer of 1973. Before these ships set out on their first commercial voyage, their operators signed collective bargaining agreements with MEBA covering their licensed deck officers. These agreements, like others negotiated by MEBA in the past, provide for a complement of only four deck officers—a master and three mates—rather than the master and four mates required by the standard MMP agreement. They also provide for lower wage rates than those provided for comparable vessels under the MMP contract.

At the time these ships were under construction, MMP had approached their owners in an effort to persuade them to recognize MMP as the bargaining representative of the licensed deck officers aboard the ships. These efforts met with no success, at least in part because of the more favorable contract terms offered by MEBA.

When the ships began commercial operations, MMP picketed them. It is undisputed that the picketing had four separate and distinct objectives: (1) to induce the employers to replace their MEBA deck officers with MMP deck officers, (2) to induce the employers to recognize MMP as the bargaining representative of their deck officers, (3) to induce the employers to enter into a collective bargaining agreement with MMP, and (4) to induce the employers to apply to their deck officers the labor standards which prevail under MMP's agreements with other employers.

The Decisions Below

Both the NLRB and the Court of Appeals held that it was a violation of Section 8(b)(1)(B) of the National Labor Relations Act for MMP to picket the ships for *any* of the four objectives described above. Section 8(b)(1)(B) makes it unlawful for a "labor organization" to "restrain or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Insofar as the picketing sought the replacement of the MEBA deck officers with MMP deck officers, the Board and the court held that it fell within the literal prohibition of the statute, since (1) MMP is a "labor organization" because of its few "employee" members, and (2) one of the duties of deck officers aboard ship is to adjust the grievances of the ship's crew. The fact that MMP neither represented nor sought to represent the crews aboard these vessels, and that the picketing was in no way directed at the process or function of adjustment of grievances, was deemed to be irrelevant.

Furthermore, the Board and the court held that it was also unlawful for MMP even to picket to obtain recognition and a collective bargaining agreement, or to induce the employers to comply with the labor standards provided in other MMP agreements.[3] Thus, the Board stated:

> "We also find no merit in Respondent's argument that Section 8(b)(1)(B) was not intended

[3] Board Member Jenkins dissented from this aspect of the decision, stating: "I see nothing in Section 8(b)(1)(B) which prohibits any union activity except interference with the employer's selection of his bargaining-grievance representative." (26a-27a.)

> to prohibit a union, which represents supervisors, from engaging in picketing solely to protect and improve the wages, hours, and working conditions of its members, and in particular to prevent the erosion of labor standards which Respondent has established over years of collective bargaining, and that Congress did not intend to prohibit picketing for the kinds of objectives which Respondent was pursuing here; i.e., recognition and/or a collective-bargaining agreement. In other words, Respondent argues that Section 8(b)(1)(B) was designed only to prohibit a union from seeking to interfere with the employer's literal 'selection' of his 8(b)(1)(B) representatives. This argument is contrary to both the facts and the law. (21a.)
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> "We agree with the General Counsel, therefore, that Respondent's entire course of conduct, which was admittedly aimed also to secure recognition as bargaining agent and to impose on the Employers its contract for licensed deck officers, interfered with the Employers' freedom to select and control their 8(b)(1)(B) representatives. It follows therefore, that this conduct which interferes with the Employers' freedom to set the terms and conditions of employment of 8(b)(1)(B) representatives in the context of this case necessarily interferes with their selection of persons to serve as representatives . . . ." (23a-24a.)

The Court of Appeals agreed, holding that "[i]mplicit in section 8(b)(1)(B) is the congressional judgment . . . that relations between an employer and its supervisory personnel should be insulated in full measure from coercive efforts by a labor union." (10a.) The court rejected MMP's contention that this reading of the statute was inconsistent with this Court's decision in *Florida Power & Light Co.* v. *International*

B'hd of Elec. Workers, 417 U.S. 790 (1974). That decision, the Court of Appeals stated, was concerned solely with "indirect coercion of the employer" by a labor organization. "Where the facts as determined by the Board disclose a case of direct coercion, and they do here, the sweep of the statute is broad enough to prohibit picketing for replacement, recognition, a collective bargaining agreement, or adherence to labor standards." (13a-14a.)

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals presents substantial and important questions concerning the rights of supervisors and their unions under the National Labor Relations Act. Contrary to the plainly expressed purpose of Congress, the decision construes Section 8(b)(1)(B) of the Act so broadly as to preclude virtually any form of picketing or other concerted activities by supervisors. In so doing, it misreads and is in clear conflict with the ruling and rationale of this Court in *Florida Power & Light Co.* v. *International B'hd of Elec. Workers*, 417 U.S. 790 (1974). The NLRB and the courts of appeals have followed a confusing and uncertain course in applying that decision. Review by this Court is necessary to clarify the scope and meaning of the statute as interpreted in *Florida Power.*

I.

The decision below is in conflict with this Court's decision in *Florida Power, supra.* In that case, the Board had held that it was a violation of Section 8(b)(1)(B) for a union to penalize certain supervisors who also were union members for crossing a picket line. The Board's theory was that such conduct "deprive[d]

the employer of the full loyalty of those supervisors," and that the statute "may properly be read to encompass any situation in which the union's actions are likely to deprive the employer of the undivided loyalty of his supervisory employees." *Id.* at 805-06. This Court emphatically rejected that interpretation, holding that "the legislative creation of this unfair labor practice was in no sense intended to cut the broad swath attributed to it by the Board." 417 U.S. at 804. As the Court explained:

> "Both the language and the legislative history of § 8(b)(1)(B) reflect a clearly focused congressional concern with the protection of employers in the selection of representatives to engage in two particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances. By its terms, the statute proscribes only union restraint or coercion of an employer 'in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances,' and the legislative history makes clear that in enacting the provision Congress was *exclusively concerned with union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment.*
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> "The specific concern of Congress was to prevent unions from trying to force employers into or out of multi-employer bargaining units . . . .
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> "Nowhere in the legislative history is there to be found any implication that Congress sought to extend protection to the employer from union restraint or coercion when engaged in any activity other than the *selection* of its representatives for the purposes of collective bargaining and grievance adjustment. The conclusion is thus inescapable that a union's discipline of one of its members

who is a supervisory employee can constitute a violation of § 8(b)(1)(B) *only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer.*" 417 U.S. at 803-05 (emphasis added).

The decision in the present case—particularly insofar as it held that MMP cannot picket an employer even for such limited and legitimate purposes as obtaining recognition as bargaining representative for licensed deck officers, obtaining a collective bargaining agreement covering such officers, or compelling the employer to apply to such officers the labor standards established in MMP's agreements with other employers—cannot be reconciled with *Florida Power*. The court below concluded that Section 8(b)(1)(B) reflects an "implicit . . . congressional judgment . . . that relations between an employer and its supervisory personnel should be insulated in full measure from coercive efforts by a labor union" (10a). That conclusion is completely at war with this Court's holding that "[n]owhere . . . is there to be found any implication that Congress sought to extend protection to the employer from union restraint or coercion when engaged in any activity other than the *selection* of its representatives for the purposes of collective bargaining and grievance adjustment." 417 U.S. at 804.

The Board will no doubt attempt to distinguish this case from *Florida Power* on the basis that one object of MMP's picketing here was to force the employers to *replace* their MEBA deck officers with MMP deck officers, and that this object falls within the literal

proscription of the statute. But this literalistic application of the statute is, in our view, also inconsistent with *Florida Power*. The entire thrust and tenor of the *Florida Power* decision is that Section 8(b)(1)(B) had a very limited purpose, and that it must be interpreted in a manner consistent with that purpose. The legislative history which the Court reviewed in detail in *Florida Power* makes it absolutely clear that Section 8(b)(1)(B) was not designed to restrict the activities of supervisory unions. Its purpose, rather, was to prevent unions which represent rank-and-file employees from attempting to control an employer's collective bargaining and grievance-adjustment policies by attempting to dictate who would perform those functions on behalf of the employer. As Senator Taft put it, in a statement relied upon in *Florida Power*:

> "This unfair labor practice referred to is not perhaps of tremendous importance, but employees cannot say to their employer, 'we do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y.' That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you will have to fire him, or we will not go to work.'" 417 U.S. at 804.

Nothing of this kind was even remotely involved here. MMP was not seeking to replace the employers' deck officers because of any objection to, or interest in, the way in which they performed their grievance-adjusting functions. It was merely seeking to obtain employment for its own members. To apply the statute to such conduct simply on the basis of a literal interpretation, without reference to its underlying purpose, is wholly inconsistent with the approach taken in *Flor-*

ida Power.[4] As Mr. Justice Holmes once wrote, "there is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen* v. *Ward*, 279 U.S. 337, 339 (1929).

In any event, the Board and the Court of Appeals did not hold that the picketing in this case was unlawful only insofar as it sought the replacement of deck officers. They went much further, holding that it was also unlawful for MMP to picket for (a) recognition, (b) a collective bargaining agreement, and (c) application of the labor standards provided under MMP agreements with other employers. The Board's order, which the court enforced, expressly prohibits picketing for *any of* these purposes. (25a-26a.)[5] This more ex-

[4] This Court has rejected this kind of literalistic interpretation of the National Labor Relations Act in other contexts as well. Thus, in *NLRB* v. *Drivers Local 639*, 362 U.S. 274, 284 (1960), the Court stated:

> "In the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established flow from such picketing. Therefore, unless there is the clearest indication in the legislative history of § 8(b)(1)(A) supporting the Board's claim of power under that section, we cannot sustain the Board's order here."

The Court reiterated this principle in *NLRB* v. *Fruit & Vegetable Packers Local 760*, 377 U.S. 58, 62-63 (1964), noting that "[b]oth the congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment."

[5] In this crucial respect, the present case differs from *International Organization of Masters, Mates & Pilots (Marine and Marketing Int'l Corp.)*, 197 N.L.R.B. 400 (1972), *enforced*, 486 F.2d 1271 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 956 (1974), on which both the Board and the court below relied. In that case, it was alleged and found that MMP violated Section 8(b)(1)(B) by picketing a vessel to force the replacement of MEBA deck officers with MMP deck officers. There was no contention in that case that the picketing had any other objects, nor did the Board's order preclude picketing for any other objects. Moreover, *Marine and Marketing* was decided before this Court's decision in *Florida Power*, and we believe the two cases are fundamentally inconsistent. In our view, the only opinion in *Marine and Marketing* which is consistent with *Florida Power* is Judge Bazelon's dissent, which stated in part:

> "Before this case, . . . the Board has never attempted to apply Section 8(b)(1)(B) to a union that neither represented, nor aspired to represent, the employer's rank-and-file employees. And the reason for this is clear: in such circumstances, the purpose that Congress intended the Section to achieve is simply not implicated." 486 F.2d at 1278.

treme part of the decision below is clearly and directly in conflict with *Florida Power*.

Although the Court of Appeals acknowledged that the legislative history "suggests a congressional desire to leave supervisors to their economic weapons" (9a), the result it reached is precisely the opposite. The decision below *deprives* supervisors of their "economic weapons," and makes the use of such weapons in pursuit of normal collective bargaining objectives an unfair labor practice. This, we submit, stands the legislative history on its head. As *Florida Power* makes clear, Section 8(b)(1)(B) was intended to apply only when a union seeks to dictate the employer's selection of the representatives through whom the employer deals with that union; it has no application to concerted activities engaged in by or on behalf of supervisors themselves.[6]

[6] The issue in this case is analogous to that which the Court decided in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 376-77 (1969). In that case, the Court held that a union which consists primarily of railroad employees subject to the Railway Labor Act, but which also includes some employees subject to the National Labor Relat ons Act, is not a "labor organization" for purposes of the NLRA when it acts on behalf of railroad employees, even though it may be subject to

II.

There has been considerable confusion and conflict within the NLRB and among the courts of appeals as to the scope and meaning of the *Florida Power* decision. Board Member (now Chairman) Fanning has repeatedly accused his brethren of interpreting that decision much too narrowly, and applying Section 8(b)(1)(B) in a manner inconsistent with it. See, e.g., *New York Typographical Union (Daily Racing Form)*, 216 N.L.R.B. 896, 897-902 (1975) (dissenting opinion); *Chicago Typographical Union (Hammond Publishers, Inc.)*, 216 N.L.R.B. 903, 905-08 (1975) (dissenting opinion), *enforced*, 539 F.2d 242 (D.C. Cir. 1976), *petition for certiorari pending*, No. 76-688; *Glaziers and Glassworkers (Glass Management Ass'n)*, 221 N.L.R.B. 509, 514 (1975) (opinion concurring in part and dissenting in part). There have also been conflicting interpretations of *Florida Power* by the courts of appeals. Compare *Wisconsin River Valley Dist. Council of Carpenters* v. *NLRB*, 532 F.2d 47 (7th Cir. 1976), with *American Broadcasting Companies Inc.* v. *NLRB*, 93 L.R.R.M. 2958 (2d Cir. 1976), *certiorari granted*, Nos. 76-1121, 76-1153, 76-1162, April 25, 1976.

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the NLRA when it acts on behalf of nonrail employees. On precisely the same reasoning, a union composed primarily of supervisors should not be deemed to be a "labor organization" for purposes of Section 8(b)(1)(B) when it acts on behalf of its supervisory membership, even though, if it also has "employee" members, it may be deemed to be a "labor organization" in other contexts. *Cf. Pan American World Airways, Inc.* v. *United B'hd of Carpenters*, 324 F.2d 217 (9th Cir. 1963), *cert. denied*, 376 U.S. 964 (1964); *United States* v. *National Marine Engineers Beneficial Ass'n*, 294 F.2d 385, 390-93 (2d Cir. 1961); *Dente* v. *International Organization of Masters, Mates & Pilots*, 492 F.2d 10 (9th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974).

Since the Court has now granted certiorari in the *American Broadcasting* case, *supra*, it will shortly have occasion to reexamine and elucidate its decision in *Florida Power*, as well as the meaning and purpose of Section 8(b)(1)(B) itself. *American Broadcasting*, however, as well as the other cases referred to above, present only a relatively narrow issue—namely, whether the holding in *Florida Power*, that a union does not violate the statute by disciplining supervisor-members who cross a picket line, applies only when such supervisors are doing work normally performed by the striking employees, or also applies when they are doing supervisory work.

The present case, while also turning upon the proper interpretation of *Florida Power*, presents somewhat different and broader issues. We therefore believe it would be appropriate for the Court to grant certiorari in this case as well, and to consider it simultaneously with *American Broadcasting*. Review of this case would enable the Court to examine Section 8(b)(1)(B) from a much larger perspective. Joint review of these two cases, which raise distinct yet related issues under the same statutory provision, would afford opportunity for full consideration of all aspects of the problem and more informed deliberation.

If, however, joint review of these cases is impractical, then this case is independently worthy of separate consideration. The decision in *American Broadcasting* will not, in itself, dispose of the issues presented in this case. Those issues should in any event be decided by the Court, both because of their intrinsic importance (see discussion *infra*) and because of the conflict between the decision below and *Florida Power*.

III.

The issues presented in this case are of large importance, and should be definitively resolved by this Court. The breadth of the interpretation which the Board and the court below have given to Section 8(b)(1)(B) is truly startling in its ramifications. Although this particular case happened to arise in the context of a "jurisdictional" dispute between two unions, the result reached, and the reasoning on which it was based, would appear to preclude a union which represents supervisors as well as employees from picketing in connection with *any* dispute concerning the wages, hours and working conditions of supervisory personnel. In effect, the Board and the court below have held that such a union can *never* picket to compel an employer (1) to hire or retain one group of supervisors rather than another, (2) to recognize the union as bargaining representative for supervisory personnel, (3) to enter into a collective agreement governing supervisors, or (4) to adopt or implement certain terms and conditions of employment for supervisors. We cannot conceive of any labor dispute with respect to supervisors which would not involve one or more of those demands.

Consider what this decision means to MMP, which is composed almost entirely of supervisors. If an employer were to fire one or more deck officers represented by MMP, MMP could not picket to obtain their reinstatement. If an employer with whom MMP has bargained in the past were to decide to discontinue such bargaining, MMP could not picket to regain recognition. If MMP and an employer are unable to agree upon the terms of a new contract, MMP could not strike or picket to enforce its demands. In short,

it is no overstatement to say that the decision in this case makes it virtually impossible for MMP to function as a union representing licensed deck officers. And the same would be equally true of any other union which represents or seeks to represent supervisors.

Although Congress, in 1947, amended the Act to exclude "supervisors" from the statutory definition of "employees"—thereby removing them from the affirmative protection of the Act—the Act has never previously been construed as *prohibiting* supervisors from joining or forming unions, bargaining collectively, or engaging in other concerted activities. Rather, the Act has always been understood as embodying a *laissez faire* policy toward concerted activities by supervisors, leaving "both foremen and employers to their economic weapons—the former to strikes and picketing to compel recognition, the latter to discriminatory discharges, espionage, and blacklists to combat efforts to organize." Cox, *Some Aspects of the Labor Management Relations Act,* 1947, 61 Harv. L. Rev. 1, 5 (1947) (emphasis added). "The result is that the collective bargaining position of such employees is to be determined by the parties themselves, not by law. This restores the status quo ante the original NLRA." Smith, *The Taft-Hartley Act and State Jurisdiction Over Labor Relations,* 46 Mich. L. Rev. 593, 600 (1948). Indeed, one of the arguments made by those who opposed the exclusion of supervisors from the protections of the Act was that it would tend to cause more strikes by supervisors. For example, the minority members of the House Committee on Education and Labor stated in their report:

> "Recognition by the National Labor Relations Board of the right of supervisors to organize and

bargain collectively has reduced the number of strikes by this class of employee. To withdraw this recognition and with it the orderly machinery for achieving organization will not eliminate unionism among supervisors. It will force them instead to the alternative of economic self-help . . . ." H. Rep. 245, 80th Cong., 1st Sess. 72 (1947).

No one suggested, at the time the Taft-Hartley Act was adopted, that the effect of the statute would be to prohibit strikes and picketing by supervisors. On the contrary, the clear intent of the Congress, as expressed both in the language of the statute and in its legislative history, was to adopt a policy of neutrality toward such activities. Yet now, thirty years after the statute was enacted, the Board and the court have held that "implicit in section 8(b)(1)(B) is the congressional judgment . . . that relations between an employer and its supervisory personnel should be insulated in full measure from coercive efforts by a labor union." (10a.) We submit that there is no indication whatever, either in the language of the statute or in its legislative history, that Congress intended to bring about such a far-reaching change in existing law and industrial practice. In any event, the sweeping implications of the decision below warrant its review by this Court.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

September 27, 1976

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *Petitioner-Cross Respondent,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent-Cross-Petitioner.*

No. 75-2820

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Before THORNBERRY* and AINSWORTH, Circuit Judges, and HOFFMAN,** District Judge.

AINSWORTH, Circuit Judge:

Section 8(b)(1)(B) of the National Labor Relations Act provides that "[i]t shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." *See* 29 U.S.C. § 158(b)(1)(B). The National Labor Relations Board determined that petitioner—International Organization of Masters, Mates and Pilots, Marine Division, International Longshoremen's Association, AFL-CIO (hereinafter "MM&P")—violated section 8(b)

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* THORNBERRY, Circuit Judge, was a member of the panel that heard oral arguments but due to illness did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. § 46(d).

** District Judge of the Eastern District of Virginia, sitting by designation.

(1)(B) by picketing two United States merchant vessels, the Ultramar and the Sugar Islander, whose licensed deck officers are represented by a rival union, Marine Engineers Beneficial Association (hereinafter "MEBA"). MM&P petitioned this court to review and reverse the Board's order, the Board cross-petitioned for enforcement, and the vessels' operators and MEBA intervened on behalf of the Board. *See* 29 U.S.C. §§ 160(e), 160(f); Fed.R.App.P. 15(d). We enforce the order.

I.

Petitioner MM&P is the principal labor union representing the licensed deck officers who serve in the United States Merchant Marine. Licensed deck officers on large merchant vessels, such as the Ultramar and the Sugar Islander, are "supervisors" within the meaning of the Act, *see* 29 U.S.C. § 152(11), as one of their duties, among others, is the adjustment of grievances that arise on shipboard. Thus, they are also "representatives" for the purposes of section 8(b)(1)(B). But MM&P represents, in addition to the licensed deck officers, a small contingent of unlicensed "employee" members.[1] *See* 29 U.S.C. § 152(3). By reason of its representation of these "employee" members, MM&P is considered by the Board to be a "labor organization" as defined in section 2(5) of the Act. *See* 29 U.S.C. § 152(5); *International Organization of Masters, Mates and Pilots* v. *NLRB*, 122 U.S.App.D.C. 74, 351 F.2d 771, 777 (1965). It thus enjoys the protections embodied in section 8(a) of the Act and, similarly, suffers the restrictions imposed by section 8(b) on its organizational and other activities. *See* 29 U.S.C. §§ 158(a), 158(b).

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[1] MM&P has approximately 200 to 250 unlicensed "employee" members. By contrast, MM&P represents nearly 6,000 licensed deck officers. The "employee" members are for the most part deckhands and cooks on tugboats, ferries, and other small vessels that are organized on a "top to bottom" basis.

Since the late 1950's MM&P has been engaged in a burgeoning jurisdictional dispute with MEBA over the right to represent licensed deck officers manning United States merchant vessels. Representation of the licensed deck officers who will serve upon a particular vessel by either MM&P or MEBA, as the case may be, is determined when the vessel's operators execute a contract with the union of their choice at or near the time when construction of the vessel is completed. The competition between the two unions has heightened since 1970 because of renewed shipbuilding activity fostered in principal part by a federal subsidy program. Because its contract is more favorable to vessel operators in many respects than the standard MM&P contract, MEBA holds a substantial competitive advantage in the fight to represent licensed deck officers on the newest generation of United States merchant vessels. MM&P's contract, for example, requires manning by a master and four mates; the MEBA contract, by contrast, only requires manning by a master and three mates. Additionally, there is a wage differential favoring the MEBA contract, and an alliance between MEBA and the Seafarers International Union, which represents unlicensed personnel, has worked in the past as an inducement for vessel operators to accept the MEBA contract.

The Ultramar, the first American flag ship capable of carrying oil, bulk cargo, and ore, is owned by CIT Corporation and bareboat chartered to Aries Marine Shipping Company. Aries entered into a crew husbanding agreement with Westchester Marine Shipping Company, under the terms of which Westchester supplies crews for the Ultramar. Westchester is in turn a party to a collective bargaining agreement with District No. 1—Pacific Coast Division, MEBA, AFL-CIO. The collective bargaining agreement between MEBA and Westchester covers licensed deck officers and engine officers aboard the Ultramar and embodies the advantages of the standard MEBA contract, including the provision for manning by a master and three mates. In

1971, shortly after construction of the Ultramar had begun, the President of MM&P received assurances from Aries that MM&P would provide representation for the licensed deck officers on the Ultramar. Two years later, however, when construction was almost completed, the Westchester crew husbanding contract was executed, and MEBA was designated as the representative of licensed deck officers on the Ultramar. In response to inquiries from MM&P, Aries took the position that Westchester was responsible for manning the Ultramar and that the proper forum to resolve the dispute between MM&P and MEBA was the AFL-CIO, the parent organization to which both MM&P and MEBA belong. In November, 1973, members of MM&P picketed the Ultramar, which was at that time in Destrehan, Louisiana. The picketers carried signs stating:

S. S. ULTRAMAR
Works its Deck Officers Under
LOWER STANDARDS
than those worked under
by Deck Officers
REPRESENTED BY
MASTER, MATES AND
PILOTS
MARINE DIVISION OF THE
INTERNATIONAL LONGSHOREMAN'S
ASSOCIATION
AFL-CIO

The second vessel picketed by MM&P, the Sugar Islander, is owned by Bankers Trust Company and time chartered to Californian & Hawaiian Sugar Company. It is the first American flag ship with a completely automated, unattended engine room. Pyramid Sugar Transport, Inc., holds the bareboat charter for the vessel and is a party to a collective bargaining agreement with District 2, Marine Engineers Beneficial Association, Associated

Maritime Officers, AFL-CIO, which provides representation for the Sugar Islander's licensed deck officers. MEBA's ally, the Seafarers International Union, represents the unlicensed personnel serving on the Sugar Islander. As was its experience with Westchester, MM&P was unsuccessful in its attempts to persuade Pyramid to enter a collective bargaining agreement naming MM&P as the labor representative for the licensed deck officers aboard the Sugar Islander. In late September, 1973, approximately one month after construction of the vessel was completed, MM&P members picketed the Sugar Islander in New Orleans with signs stating:

M/V SUGAR ISLANDER
UNFAIR TO THE
MASTERS, MATES AND PILOTS
MARINE DIVISION OF THE
INTERNATIONAL LONGSHOREMAN'S
ASSOCIATION, AFL-CIO

Three months later, in January, 1974, the Sugar Islander was picketed again, while docked at a sugar refinery in Reserve, Louisiana. The picket signs carried this time stated:

M/V SUGAR ISLANDER
Works Its Deck Officers Under
LOWER STANDARDS
than those worked under
by Deck Officers
REPRESENTED BY
MASTERS, MATES & PILOTS
MARINE DIVISION OF THE
INTERNATIONAL LONGSHOREMAN'S
ASSOCIATION
AFL-CIO

MM&P members picketed the Sugar Islander with similar signs on two more occasions in January, at Burnside, Louisiana, and at Mobile, Alabama.

Pyramid and C&H Sugar Company each filed unfair labor practice charges against MM&P with the Board in early January, 1974. At approximately the same time and as a result of the picketing of the Ultramar, Westchester also filed unfair labor practice charges. A consolidated unfair labor practice complaint issued against MM&P on February 1, 1974, and a hearing was held before an Administrative Law Judge ("ALJ"). Relying on the decision of the Board and the D.C. Circuit in *International Organization of Masters, Mates and Pilots (Marine and Marketing International Corp.)*, 197 NLRB 400 (1972), *enforced*, 159 U.S.App.D.C. 11, 486 F.2d 1271 (1973), *cert. denied*, 416 U.S. 956, 94 S.Ct. 1970, 40 L.Ed.2d 306 (1974), the ALJ concluded that the picketing of the Ultramar and the Sugar Islander fell within the literal prohibition of section 8(b)(1)(B), insofar as one object of the picketing was to force replacement of the MEBA-represented licensed deck officers with others represented by MM&P. The ALJ did not consider the extent to which other objects of the picketing were proscribed by the statute, but he did identify three other objects of MM&P's picketing: MM&P also sought (1) recognition as the sole bargaining representative for the licensed deck officers aboard the Ultramar and the Sugar Islander, (2) a collective bargaining agreement covering the licensed deck officers on the two vessels, and (3) application of the wages, terms, and conditions of employment specified in the standard MM&P contract to the licensed deck officers on the Ultramar and the Sugar Islander.

As the ALJ had done, the Board found that MM&P's picketing of the Ultramar and the Sugar Islander violated section 8(b)(1)(B) and ordered the union to cease and desist from picketing the two vessels and from "in any manner restraining or coercing [Westchester and Pyramid] in

the selection of their representatives for the purpose of the adjustment of grievances." Appendix at 6-7. MM&P was ordered to cease and desist from picketing "for the objects of forcing [Westchester and Pyramid] to recognize [MM&P] as the collective bargaining representative of [Westchester's and Pyramid's] licensed deck officers and/or to force the [employers] to enter a collective bargaining agreement with [MM&P] setting the terms and conditions of their employment." It was determined also that picketing to compel adherence to the labor standards established by MM&P violated section 8(b)(1)(B). Appendix at 2-5. The Board thus reached the issue, unaddressed by the ALJ, of the legality under section 8(b)(1)(B) of MM&P's picketing for the three objects other than replacement of the licensed deck officers on the two vessels by MM&P members.

II.

By virtue of a constitutional revision adopted in 1970, MM&P is divided into three divisions—the Inland Division, the Pilots Division, and the Offshore Division. Each division operates under its own bylaws adopted by its own membership, has its own officers' positions, treasury, and dues, and files separate disclosure reports with the Department of Labor. The Offshore Division, whose membership is restricted to licensed deck officers on large ocean-going vessels, also has its own negotiating committee, which formulates contract proposals, handles negotiations, and calls strikes. The Offshore Division is thus, at least in terms of its formal relationship with MM&P, a relatively autonomous organization.

The actual picketing of the Ultramar and the Sugar Islander was conducted by members of the Offshore Division, and no members of any other MM&P division participated. MM&P argued before the ALJ and the Board, and argues before this court, that the Offshore Division alone was

responsible for the picketing of the Ultramar and the Sugar Islander, that membership in the Offshore Division is limited to "supervisors", and that the Offshore Division is thus not a "labor organization" subject to the prohibitions of section 8(b)(1)(B).

In reviewing the Board's factual determination that MM&P was responsible for the picketing of the two vessels, we are bound to accept that determination if it is supported by substantial evidence on the record considered as a whole. *See* 29 U.S.C. § 160(e); *NLRB* v. *Unoco Apparel, Inc.*, 508 F.2d 1368, 1370 (5 Cir. 1975); *NLRB* v. *Mueller Brass Co.*, 501 F.2d 680, 683 (5 Cir. 1974). Though, as noted above, the actual picketing was conducted by members of the Offshore Division, the evidence relied on by the ALJ and the Board established that the decision to picket was made by MM&P acting through its senior officers. The president, executive vice-president, and secretary-treasurer of MM&P are simultaneously the executive officer, the assistant executive officer, and the financial officer of the Offshore Division. MM&P President O'Callaghan, who was also the executive officer of the Offshore Division, directly ordered the picketing of the Ultramar and the Sugar Islander after notification of the decision to ILA President Thomas Gleason. As did the Board, we reject the notion that a workable distinction can be made between acting in one's capacity as an officer of the Offshore Division and acting in one's capacity as an officer of MM&P, *see Selby-Battersby & Co.* v. *NLRB*, 259 F.2d 151, 156-57 (4th Cir. 1958), particularly when the records reveals, as it does here, a longstanding and bitter dispute between the parent organization and its rival for representation. *See National Marine Engineers Beneficial Association* v. *NLRB*, 274 F.2d 167 (2 Cir. 1960). We are satisfied that the Board's assignment of culpability for the picketing to MM&P was supported by substantial evidence.

III.

In so far as its object was replacement of the MEBA-represented deck officers with its own members, the picketing of the Ultramar and the Sugar Islander by MM&P was, without question, within the language of section 8(b)(1)(B). MM&P argues, however, that the statute was never intended by Congress to reach picketing that promotes or protects only the interests of those MM&P members who are "supervisors" within the meaning of the Act. When picketing is directed not to the manner in which the grievance adjusting function is performed by supervisory personnel, but to the more traditional labor concerns of wages, terms, and conditions of employment for those supervisory personnel, section 8(b)(1)(B), it is argued, should have no application.

MM&P's argument was rejected explicitly, on what we regard as solid reasoning, by the majority of a panel of the D.C. Circuit in a case presenting squarely the issue of section 8(b)(1)(B)'s applicability when the object of picketing is replacement of supervisory personnel. *See International Organization of Masters, Mates and Pilots* v. *NLRB* [*Marine & Marketing*], 159 U.S.App.D.C. 11, 486 F.2d 1271 (1973), *cert. denied*, 416 U.S. 956, 94 S.Ct. 1970, 40 L.Ed.2d 306 (1974). A union, if composed solely of supervisory personnel, is not a "labor organization" as defined in the Act and thus is not limited in its organizational and other activities by section 8(b). On identical reasoning, a union of supervisors is not protected by section 8(a)'s restraints on employer action. The legislative history of the Labor Management Relations Act, consistent with the above, suggests a congressional desire to leave supervisors to their economic weapons. *Marine & Marketing, supra* at 1273; *see* 1 Legislative History of the Labor Management Relations Act, 1947, 613 (1948); A. Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv.L.

Rev. 1, 4-5 (1947). But MM&P is not, of course, a supervisors' union. By virtue of its "employee" members, MM&P is a "labor organization" protected by section 8(a) and restrained by section 8(b). MM&P's argument, if allowed to prevail, would destroy the symmetry of protection and restraint embodied in sections 8(a) and 8(b): MM&P would be protected by section 8(a), but uninhibited in its actions by section 8(b). As was the experience of the court in *Marine & Marketing*, we are unable to locate support in the legislative history for MM&P's novel reading of the statute. *See National Marine Engineers Beneficial Association* v. *NLRB*, 274 F.2d 167, 173 (2 Cir. 1960).

Implicit in section 8(b)(1)(B) is the congressional judgment, which surfaces explicitly in another section of the Act, *see* 29 U.S.C. § 164(a), that relations between an employer and its supervisory personnel should be insulated in full measure from coercive efforts by a labor union. Thus, a union violates section 8(b)(1)(B) if it strikes to force an employer to hire only union members as foremen, *see International Typographical Union Local 28* v. *NLRB*, 278 F.2d 6 (1 Cir. 1960), *aff'd by an equally divided Court*, 365 U.S. 705, 81 S.Ct. 855, 6 L.Ed.2d 36 (1961), and the employer may demand with impunity that supervisory personnel neither retain their union membership nor participate in any way in union affairs. *See Beasley* v. *Food Fair of North Carolina*, 416 U.S. 653, 661-62, 94 S.Ct. 2023, 40 L.Ed.2d 443 (1974). A crucial feature of the employer's prerogative to demand the complete loyalty of its supervisory personnel is the concomitant right to designate as its representatives for the adjustment of grievances those persons whom it pleases. Indeed, the employer's section 8(b)(1)(B) decision can be based, permissibly, on reasons completely divorced from the grievance adjusting abilities of the different contenders for supervisory positions. The employers in the instant case, Westchester and Pyramid, were free to designate MEBA as the representative for

licensed deck officers on the Ultramar and the Sugar Islander in the belief that the MEBA contract, with its reduced manning requirement and other features, was more economical than the standard MM&P contract and reflected an understanding by the MEBA hierarchy of the precarious competitive position of the United States Merchant Marine. Notwithstanding the difficulties involved in a *post hoc* reconstruction of the employer's reasons for selecting a particular representative, *see Marine & Marketing, supra* at 1275, section 8(b)(1)(B) secures to the employer the unfettered right to select supervisory personnel, and its grounds for selection are not subject to challenge in defense of a charged violation of that provision.

We do not read the Supreme Court's decision in *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers*, 417 U.S. 790, 94 S.Ct. 2737, 41 L.Ed.2d 477 (1974), as impugning either the reasoning of the D.C. Circuit in *Marine & Marketing* or the result that we reach here. In *Florida Power & Light* the union disciplined supervisory members who crossed a picket line and performed struck work. The Board found that the union violated section 8(b)(1)(B), but the court of appeals denied the Board's petition for enforcement. The Supreme Court affirmed the denial of the Board's petition, holding that

> [t]he conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1)(B) only when [the] discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer.

416 U.S. at 804-805, 94 S.Ct. at 2744.

The factual differences between the union's conduct in *Florida Power & Light* and the picketing of the Ultramar

and the Sugar Islander are manifest. In *Florida Power & Light* the employer took the position that the supervisory personnel who were also members of the union were free to decide on an individual basis whether or not they would cross the picket line. 416 U.S. at 739, 94 S.Ct. 2737. Given that the statute speaks to coercion of the employer, sustaining the Board's determination in *Florida Power & Light* would have been difficult in light of the employer's attitude. Westchester and Pyramid, in contrast, made positive decisions to have MEBA represent the licensed deck officers on the two vessels, and there can really be no question about the coercive effect of MM&P's picketing. And, of course, the union coercion in the instant case was directed at the employers, Westchester and Pyramid, themselves; the disciplinary proceedings in *Florida Powr & Light* amounted to indirect coercion of the employer at best. When the union coercion called into question is applied directly to the employer, the Board is correct in enforcing the statute to its literal limit, which clearly encompasses picketing for replacement purposes.

IV.

The ALJ found it unnecessary to consider the legality of MM&P's picketing for objects other than replacement of the licensed deck officers on the Ultramar and the Sugar Islander. Advancing substantially beyond the ALJ's decision, however, the Board concluded that *all* objects of MM&P's picketing of the two vessels were prohibited by section 8(b)(1)(B). The Board argues that if MM&P were successful in attaining those objects other than replacement—recognition, a collective bargaining agreement, and adherence to MM&P labor standards—then the class of individuals from which Westchester and Pyramid could select representatives for the adjustment of grievances would be restricted unnecessarily. Thus, the practical effect of seeking these other objects is, the Board contends, tantamount to coercion of the employers in the selection of their licensed deck officers. We agree.

For Westchester and Pyramid to have met MM&P labor standards, particularly the manning requirement in the standard MM&P contract, would have necessitated a breach of the then-effective collective bargaining contract between the employers and MEBA. Recognition of MM&P by the employers and execution of an appropriate collective bargaining agreement between those employers and MM&P would similarly have forced a breach of the existing contract. The Board asserts that MM&P's attainment of any or all of the sought-after objectives of its picketing would have compelled MEBA to forbid its members from serving on the Ultramar or the Sugar Islander, and we have no difficulty accepting this assertion. Maintaining its competitive edge in the fight to represent licensed deck officers on ocean-going vessels turns largely on the ability of MEBA to offer employers an economical contract, which will in turn permit effective competition between United States and foreign flag vessels. Consequently, even if the only objective in fact attained were adherence to MM&P labor standards, the threat to MEBA would still be clear. The threat to MEBA raised by recognition and a collective bargaining agreement between the employers and MM&P is, of course, even more substantial. The probable and foreseeable result of MM&P's picketing for any or all the objects discussed above would be, we feel, unnecessary restriction of the class of individuals available as licensed deck officers to members of MM&P and no others. Picketing for each of these objects violated section 8(b)(1)(B).

We perceive no barrier raised by *Florida Power & Light* to the result that we reach in this section of our opinion. *Florida Power & Light* was, as we emphasized above, a decision addressed to the problem of indirect coercion of the employer. Where the facts as determined by the Board disclose a case of direct coercion. and they do here, the

sweep of the statute is broad enough to prohibit picketing for replacement, recognition, a collective bargaining agreement, or adherence to labor standards. *See NLRB* v. *Sheet Metal Workers International Association,* 199 NLRB 166 (1972), *enforced,* 502 F.2d 1159 (1 Cir. 1973), *cert. denied,* 416 U.S. 904, 94 S.Ct. 1608, 40 L.Ed.2d 109 (1974).

The petition for review is DENIED, and the cross-petition for enforcement is GRANTED.

APPENDIX B

(CAPTION OMITTED IN PRINTING)

(FILED OCTOBER 19, 1976)

Judgment

Before THORNBERRY* and AINSWORTH, Circuit Judges, and HOFFMAN,** District Judge.

THIS CAUSE came on to be heard upon a petition filed by International Organization of Masters, Mates and Pilots, Marine Division, International Longshoremen's Association, AFL-CIO, New Orleans, Louisiana, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, and representatives, on July 9, 1975, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on April 13, 1976, and has considered the briefs and transcript of record filed in this cause. On September 27, 1976, the Court being fully advised in the premises, handed down its decision denying the petition to review and granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the petition for review filed by International Organization of Masters, Mates and Pilots, Marine Division, International Longshoremen's Association, AFL-CIO, be and it is hereby denied and the said order of the National Labor Relations Board in said proceeding be en-

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* THORNBERRY, Circuit Judge, was a member of the panel that heard oral arguments but due to illness did not participate in this decision. This case is being decided by a quorum, 28 U.S.C. § 46(d).

** District Judge of the Eastern District of Virginia, sitting by designation.

forced, and that Petitioner, its officers, agents, and representatives, abide by and perform the directions of the Board in said order contained.

ENTERED: October 19, 1976
Issued as Mandate: February 11, 1977

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

February 3, 1977

EDWARD W. WADSWORTH
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

TO ALL COUNSEL OF RECORD

No. 75-2820—International Organization of Master, Mates and Pilots, etc. v. National Labor Relations Board

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk
/s/ By SUSAN M. GRAVOIS
Deputy Clerk

/smg

cc: Mr. Victor H. Hess, Jr.
Mr. Marvin Schwartz
Mr. Jerry D. Anker
Mr. Seymour Waldman
Mr. Elliott Moore
Mr. Albert H. Hanemann, Jr.
Mr. Richard H. Markowitz
Ms. Jean C. Gaskill

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

and

WESTCHESTER MARINE SHIPPING CO., INC.;
PYRAMID SUGAR TRANSPORT, INC.; AND
CALIFORNIA AND HAWAIIAN SUGAR COMPANY

Cases 15—CB—1474 and
15—CB—1475

Decision and Order

On January 17, 1975, Administrative Law Judge Frank H. Itkin issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs, and the Charging Parties and the Intervenors, District No. 1, Pacific Coast District, Marine Engineers Beneficial Association, AFL-CIO (MEBA), and District No. 2, Marine Engineers Beneficial Association, Associated Maritime Officers, AFL-CIO, filed briefs in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the

Administrative Law Judge only to the extent consistent herewith.

We find no merit in Respondent's exceptions and agree with the Administrative Law Judge that Respondent violated Section 8(b)(1)(B) of the Act by picketing the Charging Party Employers with an object of forcing the Employers to replace their licensed deck officers, who are their representatives for the purpose of the adjustment of grievances, with similar individuals who are members of Respondent (MMP).[1]

However, in agreement with the General Counsel, upon all the facts of this case, we deem it necessary to order Respondent to also cease picketing for the objects of forcing the Employers to recognize Respondent as the collective-bargaining representative of the Employers' licensed deck officers and/or to force the Employers to enter into a collective-bargaining agreement with Respondent setting the terms and conditions of their employment.[2] Respondent's conduct constitutes coercion of the Employers to secure a contract which sets the employment terms of their 8(b)(1)(B) representatives in a manner and kind other

[1] We also agree with the Administrative Law Judge's findings, as set forth in fn. 26 of the attached Decision, that Respondent's picketing was not "area standards" picketing. Respondent's admitted objective was to install its members aboard the vessels as licensed deck officer and to gain recognition and gain a contract, all of which is far beyond that which is needed to protect area standards. See *Houston Building and Construction Trades Council (Claude Everett Construction Company)*, 136 NLRB 321, 323 (1962).

[2] The situation is such that picketing for recognition and/or a contract becomes almost indistinguishable from picketing for the removal or replacement of 8(b)(1)(B) representatives. See *Miscellaneous Warehousemen, Drivers and Helpers, Local 986, affiliated with International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America (Tak-Trak, Inc.)*, 145 NLRB 1511, 1518 (1964).

than those chosen by the Employers themselves. Such objects equally interfere with the Employers' right to select their own 8(b)(1)(B) representatives and to secure their loyalty. The purpose and effect of Respondent's picketing literally and directly contravened the statutory policy of allowing an employer the unimpeded right to select its 8(b)(1)(B) representatives.

We also find no merit in Respondent's argument that Section 8(b)(1)(B) was not intended to prohibit a union, which represents supervisors, from engaging in picketing solely to protect and improve the wages, hours, and working conditions of its members, and in particular to prevent the erosion of labor standards which Respondent has established over years of collective bargaining, and that Congress did not intend to prohibit picketing for the kinds of objectives which Respondent was pursuing here; i.e., recognition and/or a collective-bargaining agreement.[3] In other words, Respondent argues that Section 8(b)(1)(B) was designed only to prohibit a union from seeking to interfere with the employer's literal "selection" of his 8(b)(1)(B) representatives. This argument is contrary to both the facts and the law.

Thus, as the Administrative Law Judge found, the purpose of the picketing of both vessels herein was to coerce the Employers to cancel their contracts with MEBA, to fire the masters and mates, and to hire instead Respondent's members. This conduct is at best inconsistent with Respondent's claims that it merely wanted to represent the 8(b)(1)(B) representatives.

[3] While these may be lawful objectives, a labor organization is clearly not free to utilize any means it chooses in order to achieve a desired result. *Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO [Safeway Stores]* v. *N.L.R.B.*, 458 F.2d 794 (C.A.D.C., 1972), enfg. 185 NLRB 884 (1970).

Furthermore, this argument is contrary to both Board and court law.[4] In *Marine Marketing*, the court noted that there was no evidence that Congress intended not to reach this type of conduct. In the words of the court:

> Petitioners next contend that, even if they are subject to its restrictions, Section 8(b)(1)(B) was never intended to reach the picketing that took place here. They argue that Section 8(b)(1)(B), so far as it pertains to grievance adjusters, is concerned solely with attempts by a labor organization to change the person utilized by the employer to adjust the grievances of members of the same organization. For example there would be an unfair labor practice under Section 8(b)(1)(B) here if SIU attempted to coerce the selection of the master and mates since the unlicensed seamen represented by SIU have their grievances adjusted by the master and mates.
>
> We have examined the legislative history with care, and there is some evidence that Congress' primary concern was with situations falling within petitioner's interpretation of the Act. See 2 Legislative History, *supra*, at 1012, 1077. But we have found nothing showing that Congress intended not to reach conduct of the sort that took place in this case—conduct which all parties agree comes within the statute's literal scope. If anything, Congress simply did not address itself to the specific problem that has arisen here, probably because it assumed that supervisors wanting to engage in this kind of picketing would avail themselves of the opportunity not to be classified as a "labor organiza-

[4] *International Organization of Masters, Mates and Pilots, International Marine Division, ILA-AFL-CIO (Marine and Marketing International Corporation)*, 197 NLRB 400 (1972), enfd. 486 F.2d 1271 (C.A.D.C., 1973), cert. denied 85 LRRM 3018. See also *New Mexico District Council of Carpenters and Joiners of America (A. S. Horner, Inc.)*, 177 NLRB 500, 502 (1969).

> tion" and thus be free of all the restraints of Section 8(b).

While we are aware that labor legislation does not readily adapt itself to the "plain meaning" school of jurisprudence, see, e.g., *National Woodwork Manufacturers Assn.* v. *N.L.R.B.*, 386 U.S. 612, 619, 64 LRRM 2801 (1967), we believe several factors militate against judicially creating an exception that would immunize MM&P's conduct here. First, petitioners concede in their brief that if the company's desire to deal with MEBA rather than MM&P was based on a valid Section 8(b)(1)(B) interest, i.e., the company's interest in the supervisory skills, qualifications or loyalties of the members of the respective unions, rather than upon financial considerations, then its decision to choose one union over the other should properly be free from coercion under the statute. This would mean that in each case where a labor organization such as MM&P or MEBA sought to put its men on a vessel presently staffed with officers of the other, the legality of their picketing would depend on the employer's reasons for ultimately choosing one union rather than the other. We doubt that Congress intended any such *post hoc* inquiry into the employer's motives where the union's action is directly and inherently destructive of a right guaranteed in the statute—the right to be free from coercion in the selection of grievance adjusters [486 F.2d at 1274].

We agree with the General Counsel, therefore, that Respondent's entire course of conduct, which was admittedly aimed also to secure recognition as bargaining agent and to impose on the Employers its contract for licensed deck officers, interfered with the Employers' freedom to select and control their 8(b)(1)(B) representatives. It follows therefore, that this conduct which interferes with the Employers' freedom to set the terms and conditions of em-

ployment of 8(b)(1)(B) representatives in the context of this case necessarily interferes with their selection of persons to serve as representatives. *Sheet Metal Workers' International Association, Local Union No. 17, AFL-CIO (George Koch Sons, Inc.)*, 199 NLRB 166 (1972). As the Board noted in *George Koch Sons*, the type of conduct herein is a warning to an employer not to select a supervisor unless the union approves of the terms and conditions of employment. The Board held:

> We think it equally clear that the work stoppages which were initiated by Respondent were for the purpose of requiring Koch to accede to the union-dictated terms and conditions of Ziltener's employment and thus coerced the Employer in the same manner as the fines levied on Ziltener [the 8(b)(1)(B) representative] himself, and we find such conduct on the part of the Union also to be violative of Section 8(b)((1)(B).[5]

Accordingly, in addition to ordering Respondent to cease picketing to force the displacement of licensed deck officers of both Employers, we shall also order that Respondent cease and desist from picketing to obtain recognition and its contract for the Employers' 8(b)(1)(B) representatives.

THE REMEDY

Having found that Respondent Union has engaged in conduct violative of Section 8(b)(1)(B) of the Act, we shall order that it cease and desist from engaging in such conduct and take certain affirmation action necessary to effectuate the purposes and policies of the Act. The Board has found that Respondent Union previously engaged in similar acts of misconduct in *Marine and Marketing International Corporation, supra,* in violation of Section 8(b)(1)(B). Further, we note that the record in the instant case reflects that the *Ultrasea,* a sister ship of the *Ultramar,* was similarly picketed. Under these circumstances, and in order to effectuate the purposes and policies of the Act, we shall therefore order that Respondent cease and desist from *in any other manner* restraining or coercing Employers Westchester Marine Shipping Co., Inc., or Pyramid Sugar Transport, Inc., in the selection of their representatives for the purpose of the adjustment of grievances.

[5] 199 NLRB at 167. *Sheet Metal Workers International Association Local Union No. Forty, AFL-CIO (The Capitol Ventilating Company)*, 202 NLRB 958, 960-96 (1973).

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, International Organization of Masters, Mates and Pilots, Marine Division, International Longshoremen's Association, AFL-CIO, New Orleans, Louisiana, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Picketing the vessels *Ultramar* or *Sugar Islander* with the object of causing Employers Westchester Marine Shipping Co., Inc., or Pyramid Sugar Transport, Inc., to replace their licensed deck officers who are represented by and who are members of Intervenors, District No. 1, Pacific Coast District, Marine Engineers Beneficial Association, AFLO-CIO, or District No. 2, Marine Engineers Beneficial Association, Associated Maritime Officers, AFL-CIO, with licensed deck officers who are members of and who are represented by Respondent Union; to obtain recognition as sole collective-bargaining representative of licensed deck officers; to enter into a collective-bargaining agreement; or to impose its terms and conditions of employment on the licensed deck officers.

(b) In any other manner, restraining or coercing said Employers in the selection of their representatives for the purpose of the adjustment of grievances.

2. Take the following affirmative action:

(a) Post at its offices and meeting halls copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 15, after being duly signed by Respondent's authorized representative, shall be posted by Respondent Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C., July 9, 1975.

Betty Southard Murphy, Chairman

Ralph E. Kennedy, Member

NATIONAL RELATIONS BOARD

(SEAL)

MEMBER JENKINS, dissenting in part:

For the reasons given by the Administrative Law Judge, I would affirm his decision. I see nothing in Section 8(b)

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[6] In the event that this Order is enforced by a Judgement of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATE COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(1)(B) which prohibits any union activity except interference with the employer's selection of his bargaining-grievance representative.

Dated, Washington, D.C., July 9, 1975.

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

Appendix

Notice to Members

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

We Will Not picket the vessels *Ultramar* or *Sugar Islander* with the object of causing Employers Westchester Marine Shipping Co., Inc., or Pyramid Sugar Transport, Inc., to replace their licensed deck officers, who are represented by and are members of District No. 1, Pacific Coast District, Marine Engineers Beneficial Assocation, AFL-CIO, or District No. 2, Marine Engineers Beneficial Association, Associated Maritime Officers, AFL-CIO, with licensed deck officers who are members of and are represented by our Union; to obtain recognition as sole collective-bargaining representative of licensed deck officers; to enter into a collective-bargaining agreement covering the terms and conditions of employment of licensed deck officers; and/or to impose on all such licensed deck officers our terms and conditions of employment.

We Will Not, in any other manner, restrain or coerce Employers Westchester or Pyramid in the selection of their representatives for the purpose of the adjustment of grievances.

International Organization of Masters,
Mates and Pilots, Marine Division,
International Longshoremen's Association,
AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Plaza Tower, Suite 2700, 1001 Howard Avenue, New Orleans, Louisiana 70113, Telephone 504-589-6361.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

and

WESTCHESTER MARINE SHIPPING CO., INC.;
PYRAMID SUGAR TRANSPORT, INC.; AND
CALIFORNIA AND HAWAIIAN SUGAR COMPANY

Case Nos. 15-CB-1474 and
15-CB-1475
(Consolidated)

I. Harold Koretzky and *John M. Skonberg, Esq.*, of New Orleans, La., for the General Counsel.

Albert H. Hanemann, Jr., Esq., of New Orleans, La., on behalf of Charging Parties.

Jean C. Gaskill, Esq., of San Francisco, Cal., on behalf of Charging Party California and Hawaiian Sugar Company.

Richard H. Markowitz, Esq., of New York, N.Y., on behalf of Intervenors.

Burton M. Epstein, Esq., of New York, N.Y., *Jerry D. Anker, Esq.*, of Washington, D.C. and *Victor H. Hess, Jr., Esq.*, of New Orleans, La., on behalf of Respondent Union.

Decision

FRANK H. ITKIN, Administrative Law Judge. These consolidated cases were tried before me on September 11, 12 and 13 and October 1 and 2, 1974, in New Orleans, Louisiana. Unfair labor practice charges were filed by Westchester Marine Shipping Co., Inc. ("Westchester") and Pyramid Sugar Transport, Inc. ("Pyramid") on January 4, 1974, and by California and Hawaiian Sugar Company ("C & H") on January 8, 1974. A consolidated unfair labor practice complaint issued on February 1, 1974. District No. 1, Pacific Coast District, Marine Engineers Beneficial Association, AFL-CIO ("Dist. No. 1, MEBA") and District No. 2, Marine Engineers Beneficial Association, Associated Maritime Officers, AFL-CIO ("Dist. No. 2, MEBA-AMO") were permitted to intervene in these proceedings.

Section 8(b)(1)(B) of the National Labor Relations Act forbids a labor organization or its agents "to restrain or coerce • • • an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." The principal issue presented in these proceedings is whether Respondent Union, in violation of Section 8(b)(1)(B), has restrained and coerced Employers Westchester and Pyramid in the selection of their representatives for the purposes of the adjustment of grievances by picketing the vessels Ultramar and Sugar Islander with obpects of causing the Employers: (1) to replace licensed personnel who are represented by and who are members of Dist. No. 1 MEBA and Dist. No. 2 MEBA-AMO with licensed personnel who are members of and who are represented by Respondent Union; (2) to recognize Respondent Union as the sole collective bargaining representative of such licensed personnel; (3) to enter into a collective bargaining agreement with Respondent Union covering the terms and conditions of employment of such licensed personnel; and/or (4) to implement for all such licensed personnel the terms and conditions of employment which are provided for licensed personnel who are represented by Respondent Union. Respondent Union argues

that the picketing complained of in these proceedings was in fact conducted by the Offshore Division of the International Organization of Masters, Mates and Pilots; that the Offshore Division is not a labor organization within the meaning of the National Labor Relations Act; and that Respondent Union is not otherwise responsible for this conduct. Respondent also argues that, *arguendo,* even if the International Organization of Masters, Mates and Pilots be found responsible for the picketing, Section 8(b)(1)(B) of the Act was never intended and should not be construed to prohibit a union concerted activities solely to protect or promote the interests of its supervisory membership. Counsel for Respondent asserts in his brief (pp. 32-33):

> • • • Section 8(b)(1)(B) was designed to protect the employer's control over the performance of his own collective bargaining and grievance-adjusting functions. But that is not what the dispute in this case is about at all. The dispute, rather, is over which organization—MEBA or MMP—will supply and represent the employers' licensed deck officers and what the terms and conditions of those licensed deck officers shall be. Section 8(b)(1)(B) was never intended to have any application to such a dispute. • • •

The facts pertaining to these and related issues are discussed below.

Upon the entire record before me, including my observation of the witnesses, and after due consideration of the brief filed by all counsel, I make the following finding of fact and conclusions of law:

Findings of Fact

I. Introduction; jurisdiction

Westchester, a New York corporation with its principal office and place of business in New York, New York, is

engaged in the operation of the M/V Ultramar, an American flag vessel carrying oil, grain and other commodities between various states of the United States and in foreign commerce. Since the commencement of its operations about August 8, 1973, the Ultramar has transported oil, grain and other commodities valued in excess of $50,000 between the various states and in foreign commerce. Aries Marine Shipping Company ("Aries"), a New York corporation with its principal office and place of business in New York, New York, is the bare boat charterer of the Ultramar. Since the commencement of the Ultramar's operations, Aries has derived revenues in excess of $50,000 for services performed in connection with the chartering of the Ultramar. I find and conclude that Westchester and Aries are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Pyramid, a Louisiana corporation with its principal office and place of business in New Orleans, Louisiana, is engaged in the operation of the M/V Sugar Islander, an American flag vessel carrying bulk sugar between Hawaii and various continental states, including Louisiana. Since the commencement of its operations in 1973, the Sugar Islander has tranported raw sugar valued in excess of $50,000 from Hawaii to Louisiana. C & H, a California corporation with its principal office and place of business in San Francisco, California, is charterer of the Sugar Islander under a 20-year time-charter. Since the commencement of the Sugar Islander's operations, C & H has derived revenues in excess of $50,000 for services performed in connection with the chartering of this vessel. I find and conclude that Pyramid and C & H are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The essentially undisputed and credible evidence of record, as discussed below, establishes and I find and conclude that the licensed deck officers, as well as licensed

engineers, employed by Westchester aboard the Ultramar and by Pyramid aboard the Sugar Islander are supervisors within the meaning of Section 2(11) of the Act and, in addition, possess authority on behalf of their respective employers to adjust grievances of the unlicensed non-supervisory personnel aboard the two vessels.[1] Further, the essentially undisputed evidence of record, as discussed below, establishes and I find and conclude that since about August 8, 1973, the terms and conditions of employment of all licensed deck officers, as well as licensed engineers, employed by Westchester aboard the Ultramar have been and continue to be covered by a collective bargaining agreement entered into between Westchester and Intervenor Dist. No. 1 MEBA; that since about June 25, 1973, the terms and conditions of employment of all licensed deck officers, as well as licensed engineers, employed by Pyramid aboard the Sugar Islander have been and continue to be covered by a collective bargaining agreement entered into between Pyramid and Dist. No. 2 MEBA-AMO; and that, consequently, since about August 8, 1973, and continuing to date, Dist. No. 1 MEBA has been and continues to be the recognized collective bargaining agent of all licensed deck officers, as well as engineers employed by Westchester aboard the Ultramar and, further, since about June 25, 1973, and continuing to date, Dist. No. 2 MEBA-AMO has been and continues to be the recognized collective bargaining agent of all licensed deck officers, as well as engineers, employed by Pyramid aboard the Sugar Islander.

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[1] Respondent, although admitting in its answer that "all licensed deck officers are supervisors within the meaning of Section 2(11) of the Act", denies that the licensed deck officers possess the authority on behalf of the employers to adjust grievances of the unlicensed non-supervisory personnel. As discussed *infra*, Section III C, the credible evidence of record establishes that the licensed deck officers aboard the two vessels possess and in fact have exercised such grievance-adjusting authority on behalf of their respective employers—Westchester and Pyramid.

And, although Respondent Union denies in its answer that it is a labor organization as alleged, I find and conclude, as discussed *infra*, that Respondent Union—International Organization of Masters, Mates and Pilots, Marine Division, International Longshoremen's Association, AFL-CIO—is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment and conditions of work, within the meaning of Section 2(5) of the Act.

II. Background; the general structure of Respondent Union and the collective bargaining agreements pertinent to these proceedings; the rivalry between Respondent Union and MEBA

The current structure of Respondent Union—International Organization of Masters, Mates and Pilots, Marine Division, International Longshoremen's Association, AFL-CIO—was established by its revised constitution adopted in 1970. Prior to that time, the Union was divided into locals. There were so-called "offshore" locals in major ports consisting of licensed deck officers on large ocean-going vessels; there were so-called "in land" locals consisting of licensed deck officers on smaller vessels such as tugboats, barges and ferries; there were Associated Maritime Workers ("AMW") locals consisting of unlicensed personnel on these smaller vessels; and there were so-called "pilots" locals consisting of pilots. Respondent's 1970 constitution provides, *inter alia*, for the merger of these locals into divisions. The "Offshore Division" was to replace the "offshore" locals; the "Inland Division" was to replace the "inland" and "AMW" locals; and the "Pilots Division" was to replace the "Pilots locals." (See G. C. Exh. 10, pp. A-1 to A-8). The "offshore" members voted to form the "Offshore Division" and the "pilots" voted to form the "Pilots Division" as generally contem-

plated by the revised constitution. However, as Respondent's President Thomas F. O'Callaghan credibly testified, the so-called "Inland Division" is not yet "fully formed"; "It just has not reached that stage yet"; "It is not created yet." Instead, there is an "Atlantic Region" and a "Pacific Region" of the so-called "Inland Division'. O'Callaghan explained:

• • •

> The Atlantic Region is in existence and the Pacific Region is in existence, but we do not have an Inland • • • Division fully formed. • • • The entire union is going through a transition period to where it is becoming a firm body now, rather than a whole lot of separate locals going on their own way.

In short, according to O'Callaghan, "It is not one cohesive body", but it is "headed in that direction."[2]

Respondent Union's Offshore and Pilots Division and its two Inland Regions have their own bylaws adopted by their own membership; their own officers, treasury and dues; and file separate disclosure reports with the Department of Labor. However, Respondent's constitution does provide that its International president, executive vice-president and secretary-treasurer also act as executive officer, assistant executive officer and financial officer of the "fully formed" divisions. Thomas F. O'Callaghan is president of Respondent Union and is also executive

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[2] Respondent Union Secretary-treasurer Robert J. Lowen credibly explained that in addition to the above "two fully formed divisions"—i.e., Offshore and Pilots—

> • • • there are four remaining subordinate bodies—the Atlantic and Gulf Region of the Inland Division, • • • the Pacific Region of the Inland Division; [and] Local 27 and Local 30 • • • in the Panama Canal.

And, although the Union's constitution provides for a Government Employees' Division and a Shoreside Division, there are presently no members in these named divisions.

officer of the Offshore Division. Robert J. Lowen is secretary-treasurer of Respondent Union and is also contract-enforcement and chief fiscal officer of its Offshore Division. Further, although other officers or officials are elected separately by each division's membership, I note, as President O'Callaghan acknowledged, a number of persons are officials of both Respondent's Offshore Division and the Regions of its not yet "fully formed" Inland Division. For example, A. Scott is port agent for Respondent's Offshore Division and is also branch agent for its Atlantic and Gulf Region of the Inland Division. The same is generally true for J. Bierne, M. Weinstein, F. Kyser and W. Beech. And, as Respondent Union's Secretary-treasurer Robert Lowen acknowledged, Respondent Union's two Regions of the Inland Division are composed of licensed supervisory personnel and approximately 200 to 250 rank-and-file personnel who are admittedly "statutory employees" under the Act.[3]

Membership in the Offshore Division is limited to licensed deck officers on large ocean-going vessels.[4] The Offshore Division has its own negotiating committee which prepares contract demands, negotiates contracts and calls strikes. Contracts negotiated by the Offshore Division's committee are subject to ratification vote by its members. The current Offshore Division collective bargaining agreement is R. Exh. 7.[5] The agreement provides, *inter alia*:

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[3] In addition, by letter dated June 28, 1971, ILA President Thomas W. Gleason wrote Respondent Union President O'Callaghan to "• • • confirm the arrangements under which the International Organization of Masters, Mates and Pilots [MMP] is being affiliated with the International Longshoremen's Association [ILA] to become known as the International Organization of Masters, Mates and Pilots, the International Marine Division of the ILA [Marine Division] • • •." See generally, G.C. Exh. 11 and attachments.

[4] The Offshore Diivsion has some 6,000 members (See R. Exh. 12).

[5] R. Ex. 7 is the "Master Collective Bargaining Agreement

1. Masters and Chief Officers selected by employers must be members of the Union (Section II(2)).
2. Licensed deck officers, except Masters and Chief Officers, must be hired through the Union (Section II (3) and (4)).
3. Licensed deck officers will not be discharged or rejected except for "just cause" (Section III).
4. A "minimum" "manning" requirement for certain classes of vessels of one Master, one non-watchstanding Chief Officer, one Second Officer and two Third Officers (Section VII).
5. Employer-financed jointly administered pension, welfare and training programs. (Sections XXIX and XXX.) (And see R. Exh. 25—the pension plan; and R. Exh. 24—the welfare plan).

Respondent Union for a number of years has represented licensed deck officers of the United States merchant marine. The Marine Engineers Beneficial Association ("MEBA") has represented licensed engineers. However, during late 1950 or early 1960, MEBA, through its affiliate the Associated Maritime Officers ("AMO"), began to compete with Respondent by negotiating collective bargaining agreements covering licensed deck officers, as well as licensed engineers. ILA President Thomas W. Gleason, in a letter to AFL-CIO President George Meany, dated February 15, 1974 (G.C. Exh. 12), attempts "to invoke [AFL-CIO] assistance to resolve a problem that is becoming increasingly acute for the * * * ILA and its affiliate, the International Organization of Masters, Mates and Pilots * * *". As Gleason explains in his letter:

* * *

(Dry Cargo and Tanker Sections) Covering All Vessels Under Contract With the International Organization of Masters, Mates and Pilots—Offshore Division."

This problem concerns the continuing campaign by the Associated Maritime Officers ("AMO") to sign pre-hire contracts with newly-formed companies, covering licensed deck officers aboard ships not yet launched. Under these agreements, AMO supplies the deck officers for these vessels and prescribes the conditions under which they are employed. Although the IOMM&P [Respondent] is the sole union chartered by the AFL-CIO to represent licensed deck officers, AMO now represents a serious threat to its jurisdictional integrity, its contract standards, the jobs of its members, and the rather fragile peace of the maritime industry itself.

* * *

What we are faced with now is a concerted campaign on the part of AMO, aided by its parent, District 2, MEBA, and its ally, the SIU [Seafarers International Union], to sign up ships from top to bottom (that is, from master to able-bodied seamen) before they have even been launched and well before any employees are to be hired. This effectively squeezes out the IOMM&P which is the only Union actually chartered by the AFL-CIO to represent deck officers.

* * *

The technological change in the American Merchant Marine and the Government's new shipbuilding program has caused AMO to emerge as a far more dangerous threat than ever before.

* * *

The launching of the new ships began in 1970 as a result of the Government's program to revitalize the merchant marine. These vessels represented the first new merchant ships built in many years. The ships of the 1970s bear little resemblance to existing vessels. They are so much bigger and faster that they move

cargo at a rate ten and twenty and more times that of present vessels. In the case of the huge new tankers, any comparison with their conventional counterparts absolutely boggles the mind.

• • •

The problem is not imaginery. Already AMO has contracts with at least six companies covering a dozen ships already built. As new ships are launched, with still more new owners, AMO will threaten not only IOMM&P jurisdiction, but also the structure of its collective bargaining agreements and the economic base of the IOMM&P pension plan.[6]

• • •

III. The Events Culminating in the Picketing of the Ultramas and Sugar Islander

A. *The Ultramar*

On June 1, 1971, Aries applied to the United States Maritime Administration and Maritime Subsidy Board for financial aid in the operation of the first American flag "OBO" (ore—bulk—oil carrier) vessels. The vessels involved were the Ultramar and a sister ship, the Ultrasea. On June 20, 1971, the Maritime Subsidy Board approved the negotiated price for the construction of each of these vessels and granted a construction differential subsidy to aid in their construction. Also approved were "the plans and specifications, as satisfying the commercial require-

[6] Also see Respondent Union President O'Callaghan's article entitled: "A Background Report on the AMO Threat to the IOMM&P", August 1974 (G.C. Exh. 10, pp. 2-3), and Gleason's letter to Meany dated May 14, 1974 (G.C. Exh. 13) with Respondent President O'Callaghan's accompanying memorandum concerning "Recent New Pre-hire Agreements Covering Licensed Deck Officers Aboard Newly Constructed Vessels", specifically listing, *inter alia*, the Sugar Island and the Ultramar.

ments of the applicant's service • • •." The plans and specifications listed a crew of 26 persons aboard the Ultramar.[7]

Captain Leo V. Berger is president and principal shareholder of Aries. He credibly explained that construction of the Ultramar was completed about August 8, 1973, at which time the vessel set sail from the National Ship Building and Steel Company shipyard in San Diego, California. Aries transferred ownership to CIT. CIT appointed Bankers Trust as its trustee of ownership. Bankers Trust in turn bareboat chartered (or leased) the vessel to Aries for 20 years. And, about August 3, 1973, Aries entered into a "Crew Husbanding Agency Agreement" with Westchester. Westchester thus became "the crew husbanding agent of Aries for the crewing • • • of each and all of the vessels now owned or which may hereafter be acquired by Aries • • •." Westchester was "authorized to take charge of and attend the employment and discharge of masters, crews and other help, in and about the operation of said vessels, and the fixing of all compensation to be paid; it being understood and agreed, however, that all costs and expenses of wages of masters, crew and other persons employed in and about said vessels shall be charged directly to and paid by Aries" (See G.C. Exh. 22).[8]

On August 8, 1973, Westchester and Dist. No. 1 MEBA entered into three-year collective bargaining agreements covering the terms and conditions of employment of all licensed deck and engine officers employed by Westchester aboard the Ultramar. Percy Overman, president of Westchester, credibly testified that, before signing these agreements, the "management of [his] Company"

[7] Schedule 1 to the proceedings before the Maritime Subsidy Board (R. Exh. 3) lists a crew of 26, consisting of one master, one chief mate, one second mate, one third mate, and 22 other persons. Thus, the crew aboard the Ultramar would have included only four licensed deck officers—a master and three mates.

[8] The "Crew Husbanding Agency Agreement" could be cancelled on 90 days written notice by either party.

> • • • discussed with me [Overman] the unions that would probably be used. I [Overman] also spoke with Captain Berger who recommended the union • • •.

Overman recalled that Berger had recommended Dist. No. 1 MEBA as the "Union to represent the licensed deck officers."[9] In addition, Berger testified that he "thought [Westchester] would take [his] recommendation, because of [his] previous background in the industry."[10] The MEBA collective bargaining agreement applicable to licensed deck officers provides for a complement of only four licensed deck officers aboard the Ultramar—a master and three mates—rather than the master and four mates which are, according to the witnesses of Respondent, generally required by Respondent Union's Offshore Division contract for comparable vessels. According to the testimony of Respondent Union Secretary-treasurer Robert Lowen, the MEBA agreement provides in effect for one less deck officer and for lower wage rates than those which are provided for on comparable vessels under contract with the Respondent's Offshore Division.[11]

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[9] Overman explained: "• • • I think the reason" why Westchester contacted and entered into an agreement with Dist No. 1 MEBA "was we [Westchester] agreed with Captain Berger essentially with the philosophy of having the one arrangement • • •" with one union. Westchester executed agreements for the unlicensed personnel on August 8, 1973, with the Seafarers International Union.

[10] As Berger put it, "• • • If they [Westchester] were smart, they would • • •." Aries, of course, could cancel Westchester's agency agreement on 90-days notice and Berger was president and principal stockholder of Aries.

[11] Berger testified that the Merchant Marine Act of 1970 "was [intended] to revitalize the American Merchant Marine • • • to set up certain standards with respect to getting subsidies • • •"; "They have to do this in order to be competitive with foreign ships of equal stature • • •"; "• • • they will subsidize three mates and a master. • • • If you want to subsidize [or hire] more,

Captain Berger previously had entered into collective bargaining agreements with Respondent Union from about 1968 to 1972 for vessels operated by three companies in which he was the principal party—Oneida Steamship Company, Inc.; Oswego Steamship Company, Inc.; and Geneva Steamship Company, Inc. When Berger's last collective bargaining agreement with Respondent Union expired in June 1972, Berger notified Respondent that he had merged all of his other shipping companies into Oswego and had sold Oswego to a third party. Thus, Berger formally apprised Respondent on June 26, 1972:

> • • • this communication is to advise you of the termination of the collective bargaining agreement between [Respondent] and [Oswego] as of June 15, 1972. Thereafter, that contract is no longer in effect and there are no vessels to which it is applicable. Please consider this communication to be the appropriate notice of the termination of this collective bargaining agreement. • • •

In the meantime, during 1971, shortly after construction had commenced on the Ultramar, Respondent Union President O'Callaghan, as he credibly testified, met with Berger "and had some discussion about the ships that he [Berger] was building." O'Callaghan recalled that Berger then "stated that our contractual relationship would remain the same." O'Callaghan testified:

> • • • I [O'Callaghan] mentioned it [to Berger] because there was a number of sweetheart agreements

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you can't be competitive with foreign ships • • •." And, at the time when Captain Berger recommended to Westchester that Dist. No. 1 MEBA supply the licensed deck officers for the Ultramar, he was aware that MEBA's manning scale would in effect be one master and three mates. The United States Coast Guard had approved a minimum total complement of 9 licensed and 17 unlicensed personnel for the Ultramar, which included only one master and three mates as licensed deck officers.

being given out by AMO, and I knew that they were approaching various companies, and I wanted to make sure that there was nothing underhanded going with Berger. He [Berger] assured me there wasn't • • •.

Subsequently, during late May or early June 1973, when construction of the Ultramar was nearly completed, O'Callaghan and Berger met again. Berger testified:

• • •

We discussed the values of the M, M & P. And Captain O'Callaghan advised me of the quality of the M, M & P and he has on hand any officers that I might need to fulfill the ship's licensed officers for deck. Captain O'Callaghan advised me that he could supply a full crew from top to bottom, meaning he could supply me engineers, mates and arrange for unlicensed personnel. And we also discussed—and Captain O'Callaghan says, "Remember you won't need engineers." And previously he said, "MEBA is offering and also AMO is offering the same up and down contract." And Captain O'Callaghan also reminded me with the new concept of shipping, mode of shipping such as gas turbines and unmanned engine rooms, that we wouldn't be needing engineers. So he would be better qualified to supply than someone else would. That's where we left that discussion. • • •

O'Callaghan acknowledged in his testimony that he had "asked [Berger] point blank, Are we going to be getting the contract?" O'Callaghan, however, credibly explained that Respondent Union was only interested in the licensed deck officers aboard the Ultramar and he denied that he had "advised Berger that [he] could supply a full crew from top to bottom • • •." [12]

[12] Insofar as O'Callaghan's version of this particular meeting differs with Berger's version, I credit O'Callaghan. The evidence of record, as discussed herein, persuades me that Respondent was only seeking to represent the licensed deck officers aboard the vessels involved. I was impressed with O'Callaghan's candor in answering the questions put to him by counsel. His answers were in my view complete and trustworthy and appear reasonable when assessed against the complete chronology as summarized herein and the related testimony of Robert Lowen. I note in this respect that Percy Overman, president of Westchester, acknowledged that he "wasn't aware that [MEBA and MMP] were offering also the same agreement to handle both the deck and engine officers • • • ". And see, C & H Exh. 3, a letter from O'Callaghan to Berger dated July 19, 1973, quoted *infra*.

On July 19, 1973, Respondent Union President O'Callaghan wrote Captain Berger, in part as follows:

• • •

Dear Captain Berger:

The International Organization of Masters, Mates and Pilots, the International Marine Division of the International Longshoremen's Association, AFL-CIO, made up of the most highly trained Officers in any merchant marine in the world, possesses the only charter issued by the AFL-CIO for Masters and other licensed Deck Officers on oceangoing vessels registered under the U.S. flag.

• • •

We are particularly pleased to be able to have the opportunity to demonstrate that the continuing exclusive recognition of the IOMM&P in representing the Master and other Licensed Deck Officers aboard the new OBO-type construction should be of paramount importance in providing labor stability and continuing the previously excellent labor-management relationships between you and your Companies and this Organization while our seagoing Officers serve as your vessel manager to increase the potential return on your investment. Our affiliation with the International Longshoremen's Association cannot help but provide addi-

tional insurance against unwarranted work stoppages in view of the nature of employment of OBO-type construction.

A copy of our current collective bargaining agreement is attached. We recognize that certain aspects of this agreement may have to be changed in the light of the new type of operation and we are agreeable to resolving any problems you envision might arise so as to ensure a long and profitable relationship together.[13]

• • •

Berger recalled that between August 3 and 8, 1973, Respondent Union's Secretary-treasurer Robert Lowen visited Berger's office in New York. Berger testified:

• • •

Mr. Lowen began explaining to me the quality of the Masters, Mates & Pilots and went into long detail regarding the school that M, M & P has in Baltimore. And in fact invited me down there to visit it. And Captain Lowen also advised me that since I am a Kings Point graduate that the union could give us the best qualified [sic]. He went into detail regarding this unique ship and we have to have a different agreement than any other presently in force. And, during this conversation, the number of mates to be supplied came up and Captain Lowen said they would supply as many as three or as many as necessary or anybody else

[13] In addition, also during mid July 1973, according to the uncontroverted testimony of Berger, ILA President Gleason telephoned Berger and stated that,

> • • • he would be manning the Ultramar with other MM&P officers. • • • [Berger] advised [Gleason] that I [Berger] am not handling that. And [Gleason] in turn advised that, "This cannot go on and I will tie up all the American ships if I have to." And [Berger] replied to him that, "you do whatever you have to, Mr. Gleason."

would supply like MEBA or anybody else. And, after the discussion, Captain Lowen, before we went to lunch, gave me a brochure on the school and also an agreement, one-page agreement, if I wanted to sign with the Masters, Mates & Pilots. During this conversation I advised Captain Lowen that Westchester Marine was crewing the vessel. I gave him the address. I may have also given the phone number • • •.

• • •

Lowen, in his testimony, recalled that he first spoke with Berger on the telephone: "• • • I [Lowen] told him [Berger] I was calling about the Ultramar • • • about the licensed deck officers • • •." Lowen and Berger, according to Lowen, subsequently met for lunch. Lowen credibly testified that at this meeting, Berger "indicated there had been no decision at the moment as to who the deck officers would be." Lowen recalled: "It seemed that the single most important criteria to Captain Berger was whether Mr. Calhoon [president of MEBA] would decide who the deck officers were going to be." According to Lowen, Berger

> • • • indicated in no uncertain terms that the only reason he had the • • • contracts for the Ultramar • • • was that Mr. Calhoon had arranged the financing for him and that [Berger] was totally committed to doing what he [Calhoon] wanted to do in respect to manning, but [Berger] said the only union that had been decided upon was MEBA District 1 for the engineers. • • •

There was, as Lowen explained, no discussion "with respect to the grievance adjustability of the MMP licensed deck officers."[14]

[14] Insofar as the above summarized testimony of Lowen with respect to this particular meetings differs with the testimony of Berger as stated above, I credit Lowen. Lowen's explanations impressed me as more candid and complete in this respect. Lowen's testimony impressed me as credible and reasonable in the context

Berger testified without contradiction that,

• • •

> On August 7, I got a call from Captain [William M.] Caldwell late in the afternoon in which he kept asking me what unions were going to man the ship. And I kept telling him it's being handled, again, being crewed and the matter [was] being handled by Westchester Marine. He kept insisting and asking me and I didn't tell him and he asked me whether the ship would sail that afternoon and I told him it would sail the next day. He said, "We are going to harass that ship until you would be glad to sell it for scrap."

Caldwell is Respondent Union's executive vice president.

During mid November 1973, Berger received a telephone call from O'Callaghan. Berger credibly testified:

• • •

> The middle of November, we had a telephone conversation with Captain O'Callaghan. And he started his conversation by saying, "What is going on here, Leo? What is this crap?" I told him, "I am not handling it. Westchester Marine is handling the crewing of the vessel," referring to the Ultramar. And he said, "Don't give me that crap. I have been around the waterfront a long time." I said, "Cap, why don't you and Calhoon [president of MEBA] get together and straighten this matter out. It's a matter that could be taken care of by the CIO—AFL-CIO." His response was, "Leo, what? Have you been talking to Calhoon;" like that I said, "No." And I said, "My door is open to come in and sign a contract whenever you are ready."

• • •

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of the other credible evidence of record including documentary evidence and the related testimony of O'Callaghan concerning his talks with Berger.

About November 29, 1973, the Ultramar was picketed in the vicinity of the Bunge Corporation Grain Elevator in Destrehan, Louisiana, with signs stating:

S. S. ULTRAMAR
Works its Decks Officers Under
LOWER STANDARDS
than those worked under
by Deck Officers
REPRESENTED BY
MASTERS, MATES AND
PILOTS
MARINE DIVISION OF THE
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION
AFL-CIO

Respondent Union President O'Callaghan testified that previously he "had spoken to the top officers of the Union • • •"; O'Callaghan "• • • suggested and we all agreed that we had to take action to protect our contracts and to protect our Union and would take whatever action was necessary to do that." O'Callaghan conferred with the "two International Officers and three district vice presidents of the Offshore Division." O'Callaghan, as he testified,

> • • • more or less turned the whole operation over to the contract enforcement officer, Bob Lowen, to handle, but I [O'Callaghan] did tell him to make sure that we make everyone aware of the fact that we wanted that contract.

O'Callaghan acknowledged that he

> • • • notified Teddy Gleason [ILA president] that I [O'Callaghan] was going to have a picket line around the Ultramar when she got into port.

The picketing was conducted by members of Respondent's Offshore Division.

O'Callaghan admitted that an object of the picketing was: "• • • I wanted a contract with them"—O'Callaghan "wanted members of the Masters, Mates and Pilots serving aboard those vessels as licensed deck officers." Lowen, when asked what were the objectives of the picketing, testified as follows:

> • • • we actually were going out for economic reprisal, among other things, to stop other people from engaging in the same type of practice to the detriment of our collective bargaining agreements, our membership, our pension plan, the whole ball of wax.
>
> • • •
>
> We didn't know what we could really accomplish. Maybe they would give us the ships back. Maybe the people on the waterfront would just flat out refuse to touch their picket lines. Maybe the company would go broke. Whatever we hoped to accomplish, we hoped to accomplish by picketing. • • •

B. *The Sugar Islander*

Donald Hare, vice president for C & H, credibly testified that C & H was the "inspiration" behind the construction of the Sugar Islander. C & H is a cooperative engaged in marketing Hawaiian raw sugar. The Marine Division of Reynolds Metal Company, in previous years, transported C & H sugar to the Gulf area. Reynolds, however, announced that its vessels would not be available for this purpose at the termination of its 10-year contract in 1973.[15]

[15] Hare also recalled that C & H had carriage of sugar on Matson Shipping Company vessels and Matson had a collective bargaining contract with Respondent Union for the licensed deck officers. Hare was generally aware that the minimum manning requirements for licensed deck officers on the Matson vessels, in accordance with

C & H became "the ultimate time charterer" of the Sugar Islander and Pyramid became the bareboat charterer and operator of the vessel. C & H selected Pyramid as bareboat charterer, according to Hare, because, *inter alia*, Pyramid "was established in the New Orleans area where almost all of [C & H's] sugar • • • is sold." C & H was also "acquainted" with Pyramid personnel and "impressed with their capability."[16]

Hare acknowledged that C & H knew that there was "a distinct possibility" that Pyramid would in turn enter into an agreement with MEBA to furnish licensed deck officers for the Sugar Islander. Further, as Hare testified, C & H was concerned with the stability and economy of the Sugar Islander's operation. Hare understood that a crew composed of MEBA licensed personnel and SIU, Seafarers International Union, unlicensed personnel would not exceed the approved Coast Guard manning of 22 persons for the Sugar Islander and would give stability to labor or personnel relations. Hare admittedly made it known to his "proposed bareboat charterer," Pyramid, that he was "interested" in MEBA.

Captain Peter Johnson, executive vice president for Pyramid, credibly testified that, "• • • in order to operate this ship [Sugar Islander] properly we needed to have one union that covered all licensed officers • • •." And, on June 25, 1973, Pyramid, as bareboat charterer of the Sugar Islander, and Dist. 2 MEBA-AMO entered into a three-year collective bargaining agreement for all licensed personnel

Respondent Union's contract, exceeded the manning as ultimately required for the Sugar Islander.

[16] Hare acknowledged:

> • • • In making the decision [to select Pyramid] we did not at anytime to the best of my recollection give conscious thought to the relative grievance adjusting ability of one union over another. • • •

employed by Pyramid aboard the Sugar Islander. On August 24, 1973, Pyramid also entered into a collective bargaining agreement with SIU for the ship's unlicensed personnel. Johnson recalled that the Sugar Islander was delivered to Pyramid from Lockheed Shipbuilding Company on August 24, 1973, in Portland, Oregon.

Respondent Union previously had requested C & H to recognize its Offshore Division as bargaining agent for the licensed deck officers aboard the Sugar Islander. Thus, on November 22, 1971, Captain Robert E. Durkin, Respondent's International vice president, wrote Boyd McNaughton, C & H's board chairman, in part as follows:

• • •

> I am sure that you recognize that to construct the subject vessel [Sugar Islander] without having the air cleared as to Labor Agreements which would permit involvement wherein the Parties can square away any problems that may relate to the construction of the new vessel, is not wise. Wisdom dictates a Collective Bargaining Agreement in the form of a Memorandum of Agreement should be executed as soon as possible.
>
> I urge most strongly that you authorize such a Memorandum to be executed by whomsoever is so authorized who will be involved in the operation of the vessel. A suggested type of Memorandum of Agreement with this Organization is attached and even though the delivery of the vessel is a long time away in one sense, the problems that would have to be resolved will arise long before the vessel is completed.
>
> Should this vessel be operated by an existing Company with whom this Organization already has a Collective Bargaining Agreement, then such a Memorandum would not be necessary. Please advise.

• • •

Thereafter, during late October through early December 1972, Respondent Union President O'Callaghan and Secretary-treasurer Lowen discussed the Sugar Islander with Wayne Brobst, vice president of industrial relations of Matson Navigation Company. These discussions occurred in Respondent's offices during their bargaining sessions with the Pacific Maritime Association. Brobst credibly testified that O'Callaghan and Lowen repeatedly stated that "they would take whatever steps were necessary to secure the manning of the Sugar Islander." Matson was accused by Respondent's representatives of "rigging the deal whereby the crew arrangements [for the Sugar Islander] had been worked out that did not include MMP representation."[17] Lowen, in his testimony, generally admitted his attempt to discuss the manning of the Sugar Islander with Brobst during the above meetings.

About September 26 and 27, 1973, the Sugar Islander was picketed in the vicinity of the Gulf Elevator and Transfer Company launch landing site in the New Orleans area with signs stating:

> M/V Sugar Islander
> Unfair to the
> Masters, Mates and Pilots
> Marine Division of the
> International Longshoremen's
> Association, AFL-CIO

The directions and instructions for this picketing came from Respondent Union President O'Callaghan to Captain Henry Stegall, Respondent's New Orleans port agent.[18]

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[17] Brobst recalled that O'Callaghan and Lowen also made similar and related accusations during April 1973.

[18] Enus Parks, employed by Dist. 2 MEBA-AMO, credibly testified that Port Agent Stegall told him during late September 1973 that "it was his [Stegall's] intention to stay there [picketing]

About January 2, 1974, the Sugar Islander was also picketed in the vicinity of the Godchaux-Henderson Sugar Refinery in Reserve, Louisiana. The signs stated:

• • •

M.V. SUGAR ISLANDER
Works Its Deck Officers Under
LOWER STANDARDS
than those worked under
by Deck Officers
REPRESENTED BY
MASTERS, MATES AND PILOTS
MARINE DIVISION OF THE
INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION
AFL-CIO

• • •

The Sugar Islander was picketed with similar signs about January 7, 1974, near the Burnside, Louisiana, terminal and about January 25 and 26, 1974, near the Texaco dock in Mobile, Alabama. The picketing was, as in the case of the Ultramar, conducted by members of Respondent's Offshore Division.[19]

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until the injunction was served • • •; he [Stegall] intended to stay intil the injunction was served and stop that business if he could because those were MMP jobs and MEBA didn't have any business representing those officers on that ship • • •."

[19] A petition for a temporary injunction against Respondent Union was filed on February 15, 1974, in the United States District Court for the Eastern District of Louisiana, pursuant to Section 10(j) of the Act. On March 14, 1974, the parties stipulated that, pending final disposition by the Board of the matters involved herein, Respondent Union would not, *inter alia*, picket the Ultramar or Sugar Islander. (See Int. Exhs. 1 and 2).

C. *The grievance-adjusting functions of licensed deck officers aboard the Ultramar and Sugar Islander*

The credible evidence of record establishes that the licensed deck officers aboard the Ultramar and Sugar Islander are authorized to and do perform grievance adjusting functions with respect to the unlicensed non-supervisory personnel aboard the vessels. Thus, the collective bargaining agreements between the Seafarers International Union and both Pyramid (G.C. Exh. 20) and Westchester (G.C. Exh. 23) for the non-supervisory unlicensed personnel aboard the two vessels clearly contemplate the adjustment of grievances by the licensed supervisory officers arising under the SIU contracts. See, generally, G. C. Exhs. 20 and 23, Art. II, Secs. 2 and 3, providing for "delegates," a "permanent ship's committee" consisting of the "boatswain," the "chief steward and the chief electrician" or "pumpman," the presentment of grievances to "superior officers," and "weekly meetings" in order "to make sure that all problems concerning the unlicensed crew are brought to light and resolved as quickly as possible • • •."

Pyramid's Executive Vice-president Peter Johnson met with the master of the Sugar Islander, Captain William McAuliffe, and the ship's engineers prior to delivery of the ship in order to familiarize them with the provisions of the SIU contract, including the handling of grievances concerning the unlicensed personnel aboard the vessel. As Captain McAuliffe credibly testified:

> • • • I was advised that I was the Company's representative in handling these things [resolving grievances] and I was to try to resolve them on the vessel if possible and bring as few problems back as possible, try to make an amicable agreement between the seaman and the company and to do it on the ship as far as possible. • • •

Likewise, Westchester President Overman discussed with the master of the Ultramar, Captain Faust, prior to that

ship's initial voyage, the applicable grievance-adjusting procedures. Overman similarly instructed Faust "to settle any disputes that did arise."

Captain McAuliffe cited instances of grievance resolution at various levels aboard the Sugar Islander. One such grievance concerned overtime payable under the SIU contract. The seaman affected presented the grievance to his duly elected departmental representatives (delegate), who, in turn, discussed the matter with the chief mate. The delegate and chief mate were unable to agree upon a resolution of the grievance and the matter was referred to the ship's chairman (the vessel's unlicensed crew representative) and the master. The Captain's interpretation of the contract was not accepted by the unlicensed personnel who appealed the grievance determination to the SIU's patrolman or port representative when the vessel reached port. The matter was then discussed by the SIU's port representative with Captain McAuliffe, Pyramid's representative at the payoff in port. Captain McAuliffe reconsidered his former interpretation of the contract and agreed to resolve the grievance by paying the disputed overtime. Another such grievance cited by Captain McAuliffe concerned a lodging claim by unlicensed crew. The crew complained that vessel malfunctions while in port in Japan during the winter caused insufficient heat during a three-day period. The crew's grievance was presented directly to the ship's chairman, who in turn, discussed the matter with the master. The grievance was resolved by Captain McAuliffe's authorization of a three-day lodging allowance per crew member. Captain McAuliffe also recalled an instance of grievance which was resolved without his involvement. The third mate was supervising the discharge of the ship's cargo when the crew claimed that an additional crew member was needed. The third mate determined to add on a crew member.

As for the Ultramar, Captain Louis Kingma, the ship's master, cited an instance when he and the SIU patrolman

or shore representative resolved grievances concerning the overtime rate to be applied in cleaning the hull in accordance with the SIU representative's interpretation in the contract. In addition, Kingma recalled that he was confronted by the ship's chairman with the crew's grievance that the vessel had not been properly secured for sea prior to leaving port in accordance with the terms of the SIU contract. The grievance was resolved by Kingma agreeing to pay the unlicensed crew the requested financial penalty. Captain Kingma also noted in his testimony that he resolved numerous overtime grievances aboard the ship.[20]

IV. Discussion

The principal issue raised here, as stated, is whether Respondent Union restrained and coerced Employers Pyramid and Westchester in the selection of their representatives for the purposes of the adjustment of grievances by picketing the vessels Ultramar and Sugar Islander in order to force the Employers to replace their licensed deck officers who had grievance adjustment functions with others who were members of Respondent Union. A similar issue was recently resolved by the Board and the Court of Appeals for the District of Columbia Circuit in *Marine and Marketing International Corporation*, 197 NLRB 400 (1972), enforced 486 F. 2d 1271 (C.A.D.C. 1973), cert. den., U.S., 85 LRRM 3018 (1974). In that case, the Board found that the union, the Respondent in the instant proceeding, violatd Section 8(b)(1)(B) of the Act by picketing a ship, the Floridian, with the object of requiring the employer to replace its captain and mates with a captain and mates who were members of Respondent Union, thereby coercing the employer to change its selection of individuals whose duties include the adjustment of employee grievances. The Court of Appeals, Chief Judge Bazelon dissenting, upheld

[20] The record reflects other related and similar instances in which grievances were resolved aboard the vessels.

the Board's findings, conclusions and order. The Supreme Court denied certiorari.

The Court of Appeals, in sustaining the Board in *Marine and Marketing, supra,* 486 F. 2d at 1273, stated:

* * *

> It is conceded by all parties that MM&P's [Respondent Union] actions come within the literal purview of the statutory language. The admitted purpose of the picketing was to pressure the company to break its contract with MEBA, fire the new MEBA master and mates, and rehire the former MM&P master and mates. The Board was obviously correct in concluding that the master and mates are representatives of the employer for the adjustment of grievances. Therefore, under the statutory language, the picketing was intended to coerce the employer in the selection of his grievance adjusting representatives.

The Court of Appeals agreed that "Section 8(b)(1)(B) would be inapplicable * * * *provided* petitioners [Respondent here] are not a labor union protected by the Act and therefore subject to its restrictions" because, as the Court explained,

> * * * Section 8(b), by its terms, applies to "a labor organization or its agents * * *." A union composed solely of supervisors is not a "labor organization" as that term is defined in the Act [Section 2(5)]. It has no statutory "employees" [Section 2(3)]. Such a union, therefore, cannot commit an unfair labor practice under any of the subsections of Section 8(b) * * *.

However, as the Court observed:

* * *

> The main difficulty with MM&P's position in the present case is that it admittedly is a "labor organization" under the Act. Indeed, our own Court has recently held that, because MM&P has certain locals containing statutory "employees", it constitutes a "labor organization" subject to the restrictions of Section 8(b). See *Int. Org. of Masters, Mates & Pilots* v. *N.L.R.B.*, 351 F. 2d 771, 777 (C.A.D.C. 1965).

Further, the Court of Appeals, quoting from the Second Circuit's decision in *National Marine Engineers Beneficial Ass'n* v. *N.L.R.B.*, 274 F. 2d 167, 173 (C.A. 2, 1960), agreed that

> "* * * the legislative history is far from being so definite or persuasive as to justify our reading the Act, in a manner opposed to its plain language, so as to permit a union in which 'employees participate' to engage in acts branded as unfair labor practices by Section 8(b) simply because the workers on whose behalf the union was acting are all supervisors."

In sum, the Court of Appeals concluded:

> * * * even though we agree with the general proposition that Congress intended to permit supervisors to resort to self-help, a supervisors' union cannot have it both ways. If it allows statutory "employees" to participate, it becomes a "labor organization" entitled to the protections given such organizations and subject to the restrictions imposed by Section 8(b) on such organizations. If it does not allow any "employees" to participate, it is freed of any responsibilities under Section 8(b) at the price of forfeiting the protection of Section 8(a) * * *.

In *Marine and Marketing, supra,* 486 F. 2d at 1274, as in the instant case, Respondent Union asserted that the restrictions of Section 8(b)(1)(B) were "never intended to reach the picketing that took place * * *. They [Respon-

dent Union] argue that Section 8(b)(1)(B), so far as it pertains to grievance adjusters, is concerned solely with attempts by a labor organization to change the person utilized by the employer to adjust the grievances of members of that same organization." The Court of Appeals, after having "examined the legislative history with care • • •", concluded:

> • • • we have found nothing showing that Congress intended not to reach conduct of the sort that took place in this case—conduct which all parties agree comes within the statute's literal scope. • • •

The Court declined to create an exception that "would immunize MM&P's conduct here." The Court stated:

> • • • the coercive nature of MM&P's picketing, especially in light of MM&P's successful efforts to capitalize on its affiliation with ILA, precludes resting the legality of MM&P's picketing on an open-ended inquiry into the company's "real purpose" in choosing MEBA over MM&P. The company has an interest in being free from coercion from labor organizations in the selection of its grievance adjusters, no matter what its reasons for choosing one union over the other. • • • [21]

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[21] The Court of Appeals distinguished the Supreme Court's decision in *Hanna Mining Co.* v. *District 2, MEBA*, 382 U.S. 181 (1965). In that case, as the Court of Appeals noted (486 F. 2d at 1275 n. 3), MEBA picketed a vessel claiming that the employer unfairly had refused to recognize the union as bargaining agent of the vessel's engineers. The Supreme Court held that state court jurisdiction to enjoin the picketing was not preempted by federal law since the conduct was not arguably proscribed by Section 8(b) of the Act. The Court of Appeals, in distinguishing *Hanna Mining Co.*, stated:

> While this may constitute an implicit holding that the picketing there did not violate Section 8(b)(1)(B), an obvious difference distinguishes the Hanna picketing from that which took place in the instant case. In *Hanna*, the picketing was not directed at having certain engineers fired and replaced, as was the case here, but rather at having MEBA recognized as the bargaining representative of the employed engineers, a majority of whom allegedly desired MEBA as their representative.

The principles applied by the Board and upheld by the Court of Appeals in *Marine and Marketing, supra*, are controlling in the instant proceeding. And, applying these principles here, I find and conclude that Respondent Union violated the prohibition of Section 8(b)(1)(B) of the Act by picketing the Ultramar and Sugar Islander in order to force Employers Westchester and Pyramid to replace their MEBA licensed deck officers who had grievance adjusting functions with licensed deck officers who were members of Respondent. Respondent Union, by the foregoing conduct, has thus restrained and coerced employers in the selection of their representatives for the purposes of the adjustment of grievances.

The credible evidence of record, as detailed *supra*, establishes that the purpose of the picketing in the instant case, as in *Marine and Marketing, supra*, was to pressure Employers Westchester and Pyramid to break their contracts with MEBA, fire the masters and mates, and hire instead Respondent's masters and mates. Thus, in the case of the Ultramar, Respondent Union President O'Callaghan first discussed this subject with Berger, an officer and principal stockholder in Aries, during 1971, while the Ultramar was under construction. O'Callaghan was then reassured by Berger "that our contractual relationship would remain the same" and that "there was nothing under-handed going with Berger" and MEBA. Subsequently, during late May or early June 1973, when construction of the Ultramar was nearly completed, O'Callaghan again met with Berger and "asked [Berger] point blank", "Are we going to get the contract" for the licensed deck officers aboard the Ul-

tramar. About this same time, on July 19, 1973, O'Callaghan also wrote Berger:

• • •

> The International Organization of Masters, Mates and Pilots, the International Marine Division of the International Longshoremen's Association, made up of the most highly trained officers in any merchant marine in the world, possesses the only charter issued by the AFL-CIO for Masters and other Licensed Deck Officers on ocean going vessels registered under the U.S. flag.

O'Callaghan stated in his letter that he was "pleased to be able to have the opportunity to demonstrate that the continuing exclusive recognition of the IOMM & P [Respondent] in representing the Master and other Licensed Deck Officers abroad the new OBO type construction should be of paramount importance in providing labor stability • • •." O'Callaghan noted that "Our affiliation with the International Longshoremen's Association cannot help but provide additional insurance against unwarranted work stoppages in view of the nature of employment of OBO type construction." O'Callaghan enclosed with his letter a "copy of our collective bargaining agreement • • •." About this time, also during mid July 1973, ILA President Gleason apprised Berger that "he would be manning the Ultramar with other MM&P officers • • •." ILA President Gleason admonished Berger that Gleason "will tie up all American ships if I [Gleason] have to."

Respondent Union Secretary-treasurer Lowen similarly spoke with Berger during early August 1973. Lowen was concerned "who the deck officers would be" on the Ultramar and he urged Berger to sign a collective bargaining agreement. And, about August 7, 1973, Respondent Union Executive Vice-president William Caldwell telephoned Berger in order to ascertain "what unions were going to

man the ship." Caldwell, unsatisfied with Berger's answer, warned Berger: "• • • We are going to harass that ship until you would be glad to sell it for scrap." Thereafter, during mid November 1973, O'Callaghan expressed his strong displeasure to Berger when advised by Berger that Westchester "is handling the crewing" of the Ultramar.

About November 29, 1973, the Ultramar was picketed in the vicinity of the Bunge Corporation Grain Elevator in Destrehan, Louisiana, with signs asserting that the Ultramar works its deck officers "under lower standards" than those worked under by deck officers represented by Respondent Union—"Masters, Mates and Pilots, Marine Division of the International Longshoremen's Association, AFL-CIO." O'Callaghan acknowledged that he "had spoken to the top officers of the Union • • •"; O'Callaghan had "• • • suggested and we all agreed that we had to take action to protect our contracts and to protect our Union and would take whatever action was necessary to do that." O'Callaghan had conferred with the two International Officers and three district vice presidents of the Offshore Division. Further, O'Callaghan had "notified Teddy Gleason [ILA President] that I [O'Callaghan] was going to have a picket line around the Ultramar when she got into port." O'Callaghan admittedly "wanted a contract • • •"; he admittedly "wanted members of the Masters, Mates and Pilots serving abroad those vessels as licensed deck officers." Respondent Union Secretary-treasurer Lowen, when asked what were, in his view, the objectives of the picketing in this case, acknowledged, in part:

• • •

> We didn't know what we really could accomplish. Maybe they would give us the ships back.[22]

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[22] O'Callaghan testified that he had "more or less turned the whole operation over to Contract Enforcement Officer Bob Lowen, but I [O'Callaghan] did tell him [Lowen] to make sure that we make everyone aware of the fact that we wanted that contract."

The credible evidence of record, as recited *supra,* also establishes a similar purpose or objective with respect to the picketing of the Sugar Islander. During late 1971, while the Sugar Islander was under construction, Captain Robert E. Durkin, Respondent's Vice-president, wrote Boyd McNaughton, C & H's board chairman, urging his company or whatever company operates the vessel to sign a collective bargaining agreement "as soon as possible." During late 1972, Respondent Union President O'Callaghan and Respondent Union Secretary-treasurer Lowen repeatedly apprised representatives of Matson Navigation Company that "they would take whatever steps were necessary to secure the manning of the Sugar Islander." And, during late September 1973, the Sugar Islander was picketed in the Gulf Area with signs stating that it was "unfair to the Masters, Mates and Pilots, Marine Division, of the International Longshoremen's Association, AFL-CIO." The directions and instructions for this picketing, like in the case of the Ultramar, came from Respondent Unon President O'Callaghan. The Sugar Islander was later picketed during January 1974 with signs identical to those used against the Ultramar. As stated, these picket signs named "Masters, Mates and Pilots, Marine Division of the International Longshoremen's Association, AFL-CIO." There is no reference in the picket sign to Respondent's "Offshore Division."

And, as discussed in Section III C, *supra,* the essentially undisputed and credible evidence of record shows that the

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Lowen, Respondent's Secretary-treasurer, was also responsible for the picketing of the Floridian in ***Marine and Marketing, supra.*** The picket sign in that case, as here, only referred to "Masters, Mates and Pilots, Marine Division, ILA, AFL-CIO" and did not refer to Respondent's "Offshore Division." The ILA honored the picket line in that case, as here. And, as the Board found in ***Marine and Marketing, supra,*** 197 NLRB at 401, O'Callaghan told that employer: "by tradition those jobs belonged to us" and "we are going to stop the ship."

licensed supervisory deck officers aboard the Ultramar and Sugar Islander, as was the case in *Marine and Marketing, supra,* perform grievance adjusting functions with respect to the unlicensed non-supervisory personnel. The collective bargaining contracts between Employers Pyramid and Westchester and the SIU for the unlicensed personnel contemplate the adjustment of such grievances by these "superior officers." The credible testimony of both Captain McAuliffe and Captain Kingma provide examples of such grievance adjusting. Respondent, in its post-hearing brief (p. 46), does not seriously dispute the fact that "* * * licensed deck officers do sometimes adjust grievances." The record establishes and I find and conclude that the licensed deck officers aboard the two ships are supervisors who in fact perform grievance adjusting functions for their respective Employers.

Respondent Union, in its answer, denies that it is a labor organization under the Act. In *Marine and Marketing, supra,* as the Court of Appeals noted, Respondent "* * * admittedly is a labor organization under the Act." Further, the Court of Appeals recalled (486 F. 2d at 1273):

> * * * our own Court has recently held that, because MM & P has certain lccals containing statutory "employees", it constitutes a "labor organization" subject to the restrictions of Section 8(b). *See Int. Org. of Masters, Mates & Pilots* v. *N.L.R.B.,* 351 F. 2d 771, 777 (C.A.D.C. 1965).

The credible evidence of record in the instant case amply establishes that the status of Respondent has not been changed in any material manner. Respondent Union still has "certain locals containing statutory employees" and continues to be a "labor organization" within the meaning of the Act. Thus, as discussed *supra,* Section II, Respondent's regions of its not yet "fully formed" Inland Divi-

sion are composed of some 200 to 250 rank-and-file personnel who are admittedly "statutory employees." [23]

The provisions of Respondent's 1970 Constitution also reflect the continuing role of the International (Respondent) in the affairs of its subordinate locals. For example, the Constitution provides:

> • • • Subordinate bodies shall have authority to negotiate agreements affecting their locality and jurisdiction exclusively. The agreements must be made in the name of the *International Organization of Masters, Mates and Pilots. No agreement shall be signed by an officer without receiving the consent of the International President* • • •. [Emphasis added].

And, the 1970 Constitution provides that International President (O'Callaghan) act as the Executive Officer of fully formed Divisions and render services thereto. The International Executive Vice President (Caldwell) is empowered to, *inter alia,* act as the Assistant Executive Officer of the fully formed Divisions. And, the duties of the

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[23] Respondent, in its post-hearing brief (pp. 5-6), states:

• • •

> Although MM P, as its name implies, is composed primarily of Masters and Mates (licensed deck officers) and pilots—all of whom are "supervisors" within the meaning of the Act—some of its subordinate bodies do represent a small number of "employees" as defined in the Act, principally unlicensed personnel (such as deck hands or cooks) on tugboats, ferries and similar vessels, which, because they employ such few people, are frequently employed on a "top to bottom" basis • • •. It is because of this small number of "employee" members that the Board regards MM P as a "labor organization" as defined in the Act. See, e.g. *International Organ. of Masters, Mates and Pilots,* 144 NLRB 1172 (1963), enforced, 351 F. 2d 771 (C.A.D.C. 1965)

• • •

International Secretary Treasurer (Lowen) include acting as Financial Officer of all fully-owned Divisions.[24]

In sum, I find and conclude that Respondent Union continues to be and is a labor organization within the meaning of Section 2(5) of the Act. Respondent asserts (br., pp. 21-25) that "the picketing complained of in this case was conducted by the Offshore Division of MM & P which is not a labor organization within the meaning of the Act." However, under applicable principles of agency law, Respondent Union is responsible for the conduct complained of in this case. Cf. *Int. Org. of Masters, Mates and Pilots* v. *N.L.R.B., supra,* 351 F. 2d at 777; *Riley-Stocker Construction Co.,* 197 NLRB 738, 742-743 (1972); *W. L. Crow Construction Co.,* 192 NLRB 808, 812-814 (1971). Here, Respondent's International officers repeatedly contacted representatives of the employers who were involved in the operation of the two vessels in an effort to have Respondent's licensed deck officers employed aboard the vessels instead of those officers who were members of MEBA. Respondent's International officers participated in the decision to picket the vessels. Indeed, Respondent Union President O'Callaghan issued the directives and instructions for the picketing and gave ILA President Gleason advance notification of the picketing. The picket signs name only Respondent Union and make no reference to its

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[24] The record reflects that a number of Respondent's representatives such as A. Scott, M. Weinstein, W. Beech, J. Bierne and F. Kyser serve in dual capacities with respect to Respondent's Offshore Division and the regions of its not yet "fully formed" Inland Division. Further, the record reflects that Respondent continues to avail itself of the Board's processes as a labor organization. Cf. *Timbalier Towing Co.,* 208 NLRB No. 89 (1974); *B. F. Diamond Construction Co.,* 163 NLRB 161 (1967), enforced 410 F. 2d 462 (C.A. 5, 1969); and *A. L. Mechling Barge Lines,* 192 NLRB 1118 (1971). All members of Respondent, including those of its inland regions, participated in electing the International Officers and in the adoption of the 1970 Constitution.

"Offshore Division." And, assessed in the context of the background rivalry between Respondent Union and MEBA with respect to the licensed deck officers and the relationship of Respondent Union to its regions and divisions, I find and conclude that Respondent is fully responsible for the Section 8(b)(1)(B) conduct in this case.[25]

Respondent argues that the Board and Court of Appeal's decision in *Marine and Marketing, supra,* is no longer controlling because of the Supreme Court's subsequent decision in *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, Local 641,* —— U.S. ——, 86 LRRM 2689 (1974). However, *Florida Power* dealt with the question of whether Section 8(b)(1)(B) proscribes union discipline of supervisor members for performing rank-and-file work during an economic strike. Here, we are concerned with direct union pressure upon employers to replace and change the identity of representatives selected by the employers for grievance adjustment functions. Accordingly, in my view, the *Florida Power* holding is not controlling here. I note, in this respect, that Judges Wright and Mackinnon, who, respectively, wrote the Court of Appeals majority and dissenting opinions in the *Florida Power* cases, formed the majority in the *Marine and Marketing* case. And, as stated, the Supreme Court denied *certiorari* in *Marine and Marketing.*[26]

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[25] Respondent, in its brief, relies upon *DiGorgio Wine Co.,* 87 NLRB 720 (1949), affirmed 191 F. 2d 642 (C.A.D.C. 1951), cert. den., 342 U.S. 869. *DiGorgio* is not controlling here because "statutory employees" are members of and participate in Respondent as demonstrated above; the picketing here was conducted under direction and instruction from Respondent; and the interests of Respondent and its "Offshore Division" are identical.

[26] At the hearing, counsel for Respondent argued that the picketing in this case was for a lawful so-called "area standards" objective. Cf. *Keith Riggs Plumbing,* 137 NLRB 1125, 1126 (1962); *Claude Everett Construction Co.,* 136 NLRB 321 (1962); *Retail Clerks Int'l Ass'n,* 166 NLRB 818, 823-824 (1967), enforcing 404 F. 2d 855 (C.A. 9, 1968). The Board, in determining whether a union has picketed for an unlawful objective, is not bound by the union's self-serving declarations of lawful object. Cf. *N.L.R.B.* v. *Local 182, Teamsters,* 314 F. 2d 53, 58-59 (C.A. 2, 1963). In the instant case, it is clear that Respondent was in fact picketing for a proscribed objective. Respondent Union President O'Callaghan acknowledged that, *inter alia,* he "wanted members of the Masters, Mates and Pilots serving aboard those vessels as licensed deck officers"—"That's right. That's all I wanted." I therefore reject this contention as not supported by the credible evidence of record.

The complaint in the instant case alleges that Respondent Union violated Section 8(b)(1)(B) of the Act by picketing the Employer's ships with the object of causing the employers to replace their licensed personnel, represented by and members of MEBA, with members of Respondent Union. Applying the principles stated in *Marine and Marketing, supra,* I find and conclude, as discussed above, that picketing for such an objective, in the circumstances of this case, is proscribed by Section 8(b)(1)(B) of the Act. However, General Counsel argues (br., pp. 36-40, 45) that Respondent's picketing was further violative of Section 8(b)(1)(B) because its object was, in addition, to cause the employers "to recognize Respondent as the sole collective bargaining representative of all licensed personnel"; "to enter into a collective bargaining agreement with Respondent covering the terms and conditions of the licensed personnel", and/or "to implement for all licensed personnel the terms and conditions of employment provided licensed personnel represented by Respondent." As General Counsel argues (br., p. 36), "* * * if the only object of Respondent's picketing were * * * to gain recognition as representative of the supervisors already employed, picketing for this object alone would have violated Section 8(b)(1)(B) in the circumstances of the instant case." Since I have found the Section 8(b)(1)(B) violation based upon what may be termed the replacement

rationale as applied in *Marine and Marketing, supra,* and in view of the order which I recommend to remedy this violation, I deem it unnecessary to determine whether or not Respondent also violated this Section because its picketing was also for recognition, or collective-bargaining-agreement, or union-standards objectives. In declining to reach these additional and alternative issues raised by General Counsel, I note that Section 14(a) of the Act states:

> Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

And, as the Supreme Court stated in *Florida Power, supra,* 86 LRRM at 2694:

> • • • By its terms, the statute proscribes only union restraint or coercion of an employer "in the selection of his representatives for purposes of collective bargaining or the adjustment of grievances", and the legislative history makes clear that in enacting the provision Congress was exclusively concerned with union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment.
>
> • • •
>
> Nowhere in the legislative history is there to be found any implication that Congress sought to extend protection to the employer from union restraint or coercion when engaged in any activity other than the *selection* of its representatives for the purposes of collective bargaining and grievance adjustment.

Cf. *Hanna Mining Co.* v. *Dist. 2, MEBA,* 382 U.S. 181 (1965) as distinguished by the Court of Appeals in *Marine and Marketing, supra,* 486 F. 2d at 1275 n. 3.

Conclusions of Law

1. Westchester, Aries, Pyramid and C & H are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent International Organization of Masters, Mates, And Pilots, Marine Division, International Longshoremen's Association, AFLO-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Union has restrained and coerced Employers Westchester and Pyramid in the selection of their representatives for the purposes of the adjustment of grievances by picketing the vessels Ultramar and Sugar Islander with an object of causing the Employers to replace their licensed deck officers who are members of and who are represented by Dist. No. 1 MEBA and Dist. No. 2 MEBA-AMO with licensed deck officers who are members of and who are represented by Respondent Union, in violation of Section 8(b)(1)(B) of the Act.

4. The unfair labor practices found herein affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent Union has engaged in conduct violative of Section 8(b)(1)(B) of the Act, I shall recommend that it cease and desist from engaging in such conduct and take certain affirmative action necessary to effectuate the purposes and policies of the Act. The Board has found that Respondent Union previously engaged in similar acts of misconduct in *Marine and Marketing, supra,* in violation of Section 8(b)(1)(B). Further, I note that the record in the instant case reflects that the Ultrasea, a sister ship of the Ultramar, was similarly picketed. Under these circumstances, and in order to effectuate the purposes and policies of the Act, I shall therefore recommend that Respondent cease and desist from *in any other man-*

ner restraining or coercing Employers Westchester or Pyramid in the selection of their representatives for the purpose of the adjustment of grievances.

ORDER [27]

Respondent International Organization of Masters, Mates And Pilots, Marine Division, International Longshoremen's Association, AFL-CIO, its officers, agents and representatives, shall:

1. Cease and desist from:

(a) Picketing the vessels Ultramar or Sugar Islander with the object of causing Employers Westchester Marine Shipping Co., Inc. or Pyramid Sugar Transport, Inc. to replace their licensed deck officers who are represented by and who are members of Intervenors District No. 1, Pacific Coast District, Marine Engineers Beneficial Association, AFL-CIO, or District No. 2, Marine Engineers Beneficial Association, Associated Maritime Officers, AFL-CIO, with licensed deck officers who are members of and who are represented by Respondent Union.

(b) In any other manner, restraining or coercing said Employers in the selection of their representatives for the purpose of the adjustment of grievances.

2. Take the following affirmative action:

(a) Post at its offices and meeting halls copies of the notice attached hereto and marked "Appendix." [28]

[27] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[28] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Copies of said notice on forms provided by the Regional Director for Region 15, after being duly signed by an authorized representative, shall be posted by Respondent Union upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to insure that said notices are not altered, defaced or covered by any other material.

(b) Notify the said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply with this Decision.

Dated at Washington, D.C.

/s/ FRANK H. ITKIN
Frank H. Itkin
Administrative Law Judge

Form NLRB-4726
(4-71)

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT picket the vessels ULTRAMAR or SUGAR ISLANDER with the object of causing Employers WESTCHESTER MARINE SHIPPING CO., INC. or PYRAMID SUGAR TRANSPORT, INC. to replace their licensed deck officers, who are represented by and are members of DISTRICT NO. 1, PACIFIC COAST DISTRICT, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, or DISTRICT NO. 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, ASSOCIATED MARITIME OFFICERS, AFL-CIO, with licensed deck officers who are members of and are represented by our Union, INTERNATIONAL ORGANIZATION OF MASTER'S, MATES AND PILOTS, MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO.

WE WILL NOT, in any other manner, restrain or coerce Employers WESTCHESTER or PYRAMID in the selection of their representatives for the purpose of the adjustment of grievances.

INTERNATIONAL ORGANIZATION OF MASTERS,
MATES AND PILOTS, MARINE DIVISION,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION
AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE
DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Plaza Tower, Suite 2700, 1001 Howard Avenue, New Orleans, Louisiana 70113 (Tel. No. (504) 589-6361)

No. 76-1686

In the Supreme Court of the United States

OCTOBER TERM, 1977

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
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INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, PETITIONER

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 539 F. 2d 554. The decision and order of the National Labor Relations Board (Pet. App. 19a-75a) are reported at 219 NLRB 26.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1976 (Pet. App. 15a-16a). A petition for rehearing was denied on February 3, 1977 (Pet. App. 17a). On April 25, 1977, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including June 1, 1977. The petition was filed on May 27, 1977.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly concluded that the union restrained and coerced the employers in the selection of their representatives for the purpose of grievance adjustment by picketing the employers' ships in order to force the employers to replace those representatives with members of the union, to recognize the union as the collective bargaining agent of those representatives, and to enter into a collective bargaining agreement or other contractual arrangements with the union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at Pet. 3-4.

STATEMENT

A. The Board's Findings of Fact

The International Organization of Masters, Mates and Pilots, Marine Division, International Longshoremen's Association, AFL-CIO ("MMP"), petitioner in this case, is a union which represents both licensed deck officers on oceangoing vessels and smaller inland vessels and between 200 and 250 unlicensed, rank-and-file employees on inland vessels (Pet. App. 35a-37a).[1]

[1]The petition does not contest the Board's finding (Pet. App. 67a-68a) that MMP, and not just its Offshore Division, was responsible for the picketing at issue in this case. The Offshore Division is composed of some six thousand licensed deck officers on oceangoing vessels (Pet. App. 37a).

For many years, another labor organization—the Marine Engineers Beneficial Association ("MEBA")—has represented the licensed engineers on ships in the United States Merchant Marine (Pet. App. 38a). In the late 1950's and 1960's, MEBA, through its affiliate, the Associated Maritime Officers ("AMO"), began to compete with MMP by negotiating collective bargaining agreements under which MEBA supplied licensed deck officers as well as licensed engineers. The competition accelerated in 1970 when the United States government initiated a subsidy program to encourage the construction of new merchant ships. In the competition for bargaining agreements covering the licensed deck officers on the new ships, MEBA held an edge over MMP insofar as it offered to supply officers under a standard agreement which had a lower wage schedule and a lower manning scale—requiring a master and three mates rather than, as in the MMP agreement, a master and four mates (Pet. App. 38a-39a, 42a).

In 1971, the Aries Shipping Company was granted a government subsidy to build two ships, the M/V *Ultramar* and the M/V *Ultrasea* (Pet. App. 40a). Shortly after construction began, MMP President Thomas F. O'Callaghan approached Leo V. Berger, the president and principal stockholder of Aries, to warn him against entering into a MEBA contract for the ships (Pet. App. 43a-44a). In the summer of 1973, when construction of the *Ultramar* neared completion, O'Callaghan spoke with Berger to see if MMP was "going to be getting the contract" and followed this up with a letter urging the hiring of MMP officers and enclosing a copy of the standard MMP agreement (Pet. App. 44a-45a). Thomas W. Gleason, president of the International Longshoremen's Association ("ILA"), with which MMP is affiliated, also called Berger to insist on the manning of the *Ultramar* with MMP officers. When

Berger said someone else would be handling the crewing, Gleason threatened that "this cannot go on and I will tie up all the American ships if I have to * * *" (Pet. App. 46a n. 13).

On August 3, 1973, Aries contracted with Westchester Marine Shipping ("Westchester") to handle the crewing of Aries ships, including the *Ultramar* (Pet. App. 41a). When an MMP representative learned of this arrangement, the representative told Berger that "[w]e are going to harass the ship until you would be glad to sell it for scrap" (Pet. App. 48a). Westchester subsequently signed an agreement with MEBA covering all licensed deck officers and engineers on the *Ultramar* (Pet. App. 41a).

MMP officials decided to take "whatever action was necessary" to "protect our contracts"; and, on November 29, 1973, MMP members picketed the *Ultramar* carrying signs with the following message (Pet. App. 49a):

S. S. ULTRAMAR
Works its Deck Officers Under
LOWER STANDARDS
than those worked under
by Deck Officers
REPRESENTED BY
MASTERS, MATES AND
PILOTS
MARINE DIVISION OF THE
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION
AFL-CIO

ILA President Gleason had received advance notification of the picketing, and the ILA honored the picket line (Pet. App. 63a-64a n. 22.)

The campaign against MEBA also focused on the M/V *Sugar Islander*, a ship constructed for the California and

Hawaiian Sugar Company (C & H) (Pet. App. 50a). MMP representatives wrote a C & H executive in November 1971, urging that C & H sign an MMP agreement covering the licensed deck officers on the vessel (Pet. App. 52a). Thereafter, in discussions taking place in 1972 and 1973 with an official of Matson Navigation Company, a C & H subsidiary, MMP representatives repeatedly brought up the matter, vowing that MMP "would take whatever steps were necessary to secure the manning of the *Sugar Islander*" (Pet. App. 53a). In August 1973, Pyramid Sugar Transport, Inc. ("Pyramid")—a company selected by C & H to operate the *Sugar Islander*—entered into a collective bargaining agreement with MEBA covering both licensed deck officers and engineers (Pet. App. 41a, 51a).

On September 26 and 27, 1973, MMP members picketed the *Sugar Islander* in the port of New Orleans carrying signs reading as follows (Pet. App. 53a):

M/V SUGAR ISLANDER
UNFAIR TO THE
MASTERS, MATES AND PILOTS
MARINE DIVISION OF THE
INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, AFL-CIO

MMP members picketed the ship again in other southern ports on January 2, 7, 25, and 26, 1974 (Pet. App. 54a). An action for an injunction against the picketing under Section 10(j) of the Act, 29 U.S.C. 160(j), was filed on February 15, 1974; and the parties subsequently stipulated that MMP would not picket the *Ultramar* or the *Sugar Islander* until final disposition by the Board of the underlying unfair labor practice charges (Pet. App. 54a n. 19).

The licensed deck officers serving on the *Ultramar* and the *Sugar Islander* have grievance-adjustment authority as representatives of their employers and have exercised

such authority in dealing with grievances of unlicensed personnel serving under them (Pet. App. 55a-57a).

B. The Decisions Below

The Board, in agreement with the Administrative Law Judge, found that the licensed deck officers aboard the *Ultramar* and *Sugar Islander* represented their employers in the adjustment of grievances, and that MMP had violated Section 8(b)(1)(B) of the Act by picketing the vessels with the object of causing the employers, Westchester and Pyramid, to replace their MEBA member licensed deck officers with licensed deck officers who belonged to and were represented by MMP (Pet. App. 25a, 71a). The Board further found that, since the "situation is such that picketing for recognition and/or a contract becomes almost indistinguishable from picketing for the removal or replacement of 8(b)(1)(B) representatives," MMP had also violated Section 8(b)(1)(B) by picketing for the objects of forcing the employers to recognize MMP as the collective bargaining representative of their licensed deck officers, forcing the employers to enter into a bargaining agreement with MMP covering such officers, or imposing the terms and conditions of an MMP agreement on the employers' licensed deck officers (Pet. App. 20a and n. 2, 21a). The Board ordered MMP to cease and desist from the unfair labor practices found and from "*in any other manner* restraining or coercing [Westchester and Pyramid] in the selection of their representatives for the purpose of the adjustment of grievances" (Pet. App. 25a-27a).[2]

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[2]The Board found that the record reflected "that the *Ultrasea*, a sister of the *Ultramar*, was similarly picketed," (Pet. App. 25a) and it took notice of MMP picketing previously found unlawful in *International Organization of Masters, Mates and Pilots, et al.* v. *National Labor Relations Board (Marine & Marketing International Corp.)*, 486 F. 2d 1271 (C.A.D.C.), certiorari denied, 416 U.S. 956 (hereafter *Marine and Marketing*).

The court of appeals affirmed the Board's findings and conclusions and enforced its order (Pet. App. 1a-14a). The court observed that picketing with the object of replacing MEBA licensed deck officers with MMP members "was, without question, within the language of section 8(b)(1)(B)" (Pet. App. 9a), and it rejected MMP's contention that Section 8(b)(1)(B) should nevertheless be held inapplicable because the picketing did not specifically concern the performance of the grievance-adjustment function. The court noted that MMP's contention would destroy "the symmetry" of the Act, under which a labor organization receives the protection of Section 8(a) of the Act and incurs the prohibitions of Section 8(b)—including the prohibition against restraining the employer's right "to designate as its representatives for the adjustment of grievances those persons whom it pleases," whether or not their "grievance-adjusting abilities" figure in its selection (Pet. App. 10a).

The court also rejected the contention that the Board's decision was inconsistent with this Court's decision in *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, Local 641*, 417 U.S. 790. It distinguished *Florida Power* on the ground, *inter alia*, that the union disciplinary proceeding there "amounted to indirect coercion of the employer at best," whereas here union coercion was "applied directly to the employer" (Pet. App. 11a-12a).

Finally, the court upheld the portions of the Board's order prohibiting picketing for the objectives of forcing recognition and/or the imposition of contract terms respecting the licensed deck officers. It agreed with the Board that "the practical effect of seeking these other objects is * * * tantamount to coercion of the employers in the selection of their licensed deck officers" (Pet. App. 12a-13a). Recognizing MMP as the representative of their licensed

deck officers or entering into an MMP contract covering such officers would, the court observed, put the employers in breach of their agreements with MEBA, under which the MEBA deck officers were supplied, and unnecessarily restrict "the class of individuals available as licensed deck officers to members of [MMP] and no others" (Pet. App. 13a).

ARGUMENT

1. Petitioner contends that its picketing should be held exempt from the sweep of Section 8(b)(1)(B) because it was conducted by and on behalf of supervisors seeking to secure the jobs of the employers' Section 8(b)(1)(B) representatives, rather than on behalf of a union "attempting to control an employer's collective bargaining and grievance-adjustment policies" (Pet. 13).

Section 8(b)(1)(B) of the Act provides that "it shall be an unfair labor practice for a labor organization or its agents—* * * to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Petitioner does not here dispute the Board's findings that, since its membership includes some statutory employees (*supra*, p. 2), it is a labor organization within the meaning of Section 2(5) of the Act, 29 U.S.C. 152(5), and that the deck officers concerned were representatives of the employers for the purpose of the adjustment of grievances. Moreover, it concedes that replacement of MEBA deck officers was an objective of its picketing (Pet. 7). Accordingly, the court of appeals correctly observed that, insofar as MMP picketed the *Ultramar* and the *Sugar Islander* with the object of replacing "the MEBA-represented deck officers with its own members," the picketing "was, without question, within the language of section 8(b)(1)(B)" (Pet. App. 9a). In so concluding, the court below simply followed a long line of cases holding that a

labor organization violates Section 8(b)(1)(B) of the Act when it strikes, pickets, or engages in other coercive conduct in order to induce an employer to select bargaining or grievance adjustment representatives whom it does not want, or to forego representation by representatives of its own choosing.[3]

The decision below is in accord with the legislative history of the Act,[4] which indicates that Congress intended to accord the employer an unfettered right to select his representatives for grievance adjustment and collective bargaining. Picketing by a labor organization to force the replacement of such representatives abridges that right whether the labor organization is motivated by dissatisfaction with the manner in which the representatives perform those functions, or, as here, by a desire to find

[3]See, *e.g.*, *Laborers' International Union Local 478 (International Builders of Florida, Inc.)*, 204 NLRB 357, enforced, 503 F. 2d 192 (C.A.D.C.) (union's attempt to force employer to hire an extra foreman to serve as a "buffer" between employees and allegedly racist foremen); *Plumbers and Steamfitters Local Union No. 100*, 188 NLRB 951, 953-954, enforced *per curiam*, 491 F. 2d 1104 (C.A. 5) (threat to refuse to refer workers from hiring hall unless employer replaced its general foreman with a member of the local); *International Typographical Union, Local 38 (Haverhill Gazette Co.)*, 123 NLRB 806, 827, enforced, 278 F. 2d 6, 11-13 (C.A. 1), affirmed by an equally divided Court on this issue, 365 U.S. 705, 707 (strike to compel employer to agree to contract clause requiring foremen to be union members); *International Typographical Union (American Newspaper Publishers Assn.)*, 86 NLRB 951, 957, enforced, *American Newspaper Publishers Ass'n.* v. *National Labor Relations Board*, 193 F. 2d 782, 805 (C.A. 7), certiorari denied, 344 U.S. 812 (threat to strike to compel employers to agree that all foremen would be union members); *Los Angeles Cloak Joint Board (Helen Rose Co., Inc.)*, 127 NLRB 1543 (picketing to force employer to replace its industrial relations consultant).

[4]The pertinent history is set forth in *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, Local 641*, *supra*, 417 U.S. at 803-804.

jobs for its members. Accordingly, the court below, following the decision of the Court of Appeals for the District of Columbia Circuit in *Marine & Marketing, supra*, which involved a similar fact situation, properly concluded that MMP violated Section 8(b)(1)(B) by picketing to force the employers to replace the MEBA-represented deck officers.[5]

2. This conclusion is not inconsistent with this Court's decision in *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, Local 641, supra*. There, the Court held only that a union did not violate Section 8(b)(1)(B) of the Act by imposing fines on supervisor-members who crossed the union's picket line to perform rank-and-file work during a strike. In reviewing the decisions construing Section 8(b)(1)(B), this Court expressly approved and distinguished those decisions finding a violation of that section where unions had exerted direct pressure on employers respecting their selection of representatives for the purposes of collective bargaining or the adjustment of grievances, including cases in which the union sought the selection of its own members for positions which included grievance adjustment responsibilities. 417 U.S. at 798-799. In those "direct pressure" cases, as in the present case, the unions were attempting "to dictate to employers who would represent them in collective bargaining and grievance adjustment" (417 U.S. at 803), thereby coming within Section

[5]This conclusion does not ignore the fact that the Act embodies "a *laissez faire* policy toward concerted activities by supervisors" (Pet. 19). Since MMP has not chosen to divest itself of its employee membership, it is, as the court below pointed out, properly held accountable as a "labor organization" for violations of Section 8(b) of the Act, just as it is accorded the protection of Section 8(a) by virtue of that status (Pet. App. 10a). Accord: *Marine & Marketing, supra*, 486 F. 2d at 1274.

8(b(1)(B)'s literal terms. Indeed, this Court denied a petition for certiorari in *Marine & Marketing, supra*, which presented a question virtually identical to that in the instant case, while *Florida Power* was pending before the Court and even though a conflict with that decision was asserted.

By the same token, this Court would not, as petitioner suggests (Pet. 17), be aided in its consideration of *American Broadcasting Companies, Inc.* v. *National Labor Relations Board*, 547 F. 2d 159 (C.A. 2), certiorari granted, April 25, 1977 (Nos. 76-1121, 76-1153, 76-1162), by hearing it together with the present case. *American Broadcasting* concerns the imposition of union fines on supervisors who cross a picket line to do supervisory work; although distinguishable from *Florida Power*, it does not involve coercion aimed directly at an employer, as does the union action here.[6]

[6]Contrary to petitioner's contention (Pet. 15 n. 6), the issue in this case is not "analogous to that which the Court decided in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 376-377 (1969)." In *Jacksonville Terminal*, this Court held that state court jurisdiction over picketing in a railway dispute was not preempted by the primary jurisdiction of the National Labor Relations Board, even though a small percentage of the union's membership consisted of non-railway employees who were not subject to the Railway Labor Act and might have been subject to the National Labor Relations Act (394 U.S. at 375-376). A contrary holding, the Court observed, might raise "a serious question" whether the parties to railway disputes would ever be "obligated to pursue the Railway Labor Act's procedures, and whether the Mediation and Adjustment Boards could ever concern themselves with a dispute—until the matter had first been submitted to the NLRB and that agency had determined that it lacked jurisdiction" (394 U.S. at 376). The present case, of course, does not involve preemption principles; and, more significantly, the Board's assertion of jurisdiction over MMP does not threaten to usurp procedures incorporated in another labor statute.

3. Petitioner contends that the portions of the Board's order prohibiting MMP from picketing the employers' ships for certain objects in addition to replacement of the licensed deck officers with MMP members reflect an interpretation of Section 8(b)(1)(B), "truly startling in its ramifications," which would make it "virtually impossible" for MMP or "any other union which represents or seeks to represent supervisors" to function as a union (Pet. 18-19). This contention overlooks the special circumstances which led the Board to conclude that such an order was necessary in this case to protect the employers from continuing coercion with respect to their selection of Section 8(b)(1)(B) representatives.

As petitioner concedes (Pet. 4-6), the picketing here took place in the context of MMP's long-term struggle against MEBA, which represented the licensed deck officers and negotiated the collective bargaining agreements of the picketed ships. Since collective agreements in this industry typically provide that the employer will hire only members of the contracting union (Pet. 6), the employers would have been required to replace all the MEBA officers if MMP had succeeded in obtaining a contract covering the licensed deck officers on these vessels. In short, the Board properly found that "[t]he situation is such that picketing for recognition and/or a contract becomes almost indistinguishable from picketing for the removal or replacement of 8(b)(1)(B) representatives" (Pet. App. 20a n. 2). In addition, as the Board noted (Pet. App. 23a-24a), MMP's picketing for any or all of the proscribed objects would coerce the employers in the selection of their Section 8(b)(1)(B) representatives by warning them not to select any persons except those who would work on MMP's terms. As the court below concluded (Pet. App. 13a), the "probable and foreseeable result" would be to restrict "the class of individuals available as licensed deck officers to members of [MMP] and no others."

Thus, contrary to petitioner's contention (Pet. 18), the decision here does not hold that a labor organization which represents both employees and supervisors "can *never* picket to compel an employer (1) to hire or retain one group of supervisors rather than another, (2) to recognize the union as bargaining representative for supervisory personnel, (3) to enter into a collective agreement governing supervisors, or (4) to adopt or implement certain terms and conditions of employment for supervisors." Picketing with respect to the positions of supervisors who do not possess grievance-adjustment or collective-bargaining authority would not violate Section 8(b)(1)(B). The holding in the present case does not preclude a union from, for example, picketing to urge higher wages for supervisors it already represents. In sum, the order here must be read in light of the facts of this particular case, and, so viewed, it is a proper exercise of the Board's remedial authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1977.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1686

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD, *et al.*,

Respondents.

BRIEF OF INTERVENORS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondents.

BRIEF OF INTERVENORS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Intervenors District No. 1-Pacific Coast District, Marine Engineers Beneficial Association, AFL-CIO and District 2 Marine Engineers Beneficial Association-Associated Maritime Officers, AFL-CIO (hereinafter referred to collectively as MEBA), submit this Brief in opposition to the Petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

I. Introduction

This matter is before the Court on a Petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals enforced the Order of the National Labor Relations Board finding that Inter-

national Organization of Masters, Mates and Pilots (hereinafter referred to as MMP) violated Section 8(b)(1)(B) of the National Labor Relations Act (hereinafter referred to as the Act), 29 USC 158(b)(1)(B). MMP has filed the instant Petition for a writ of certiorari.

Two Courts of Appeals have considered the exact issue involved here and have reached the same results. In *International Organization of Masters, Mates and Pilots (Marine and Marketing Corporation)*, 197 NLRB No. 69 (1972), enforced, *International Organization of Masters, Mates and Pilots* v. *NLRB,* 486 F.2d 1271 (D.C. Cir. 1973), *cert. den.* 416 U.S. 956 (1974), the Court of Appeals for the District of Columbia Circuit enforced a Board Order finding MMP to have violated Section 8(b)(1)(B) by the same conduct as gives rise to the instant proceeding. And in the instant case, the Court of Appeals for the Fifth Circuit followed the Court of Appeals for the District of Columbia Circuit and similarly found the same conduct to be a violation of the Act by MMP.

The Petition for a writ of certiorari in the instant case raises no new or unusual issue. The National Labor Relations Board and the Courts of Appeals have uniformly found that MMP's picketing of vessels to obtain the replacement of existing deck officers, to secure recognition of MMP and a collective bargaining agreement or to require compliance by an employer with MMP's alleged labor standards is in violation of Section 8(b)(1)(B) of the Act. This Petition does not raise any question of differing statutory interpretations or of important national significance. The decision of the Court of Appeals was correct. Intervenors, therefore, submit that the Petition for a writ of

certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

II. Statement of the Case

MMP's picketing of two newly constructed vessels gives rise to the instant case. The first such vessel, the M/V Ultramar, is owned by CIT Corporation and bareboat chartered to Aries Marine Shipping Company. Aries entered into a crew husbanding agreement for the vessel with Westchester Marine Shipping Company under which Westchester supplies the crews and other provisions for the vessel. Westchester is a party to a collective bargaining agreement with Intervenor District No. 1-Pacific Coast District, MEBA, AFL-CIO which represents all supervisory licensed marine officers aboard the vessel.

In November, 1973, members of MMP picketed the M/V Ultramar in Destrehan, Louisiana with picket signs stating that its deck officers were employed under lower standards than those enjoyed by members of MMP. The picketing was preceded by a number of requests and demands by MMP to the owners and operators of the vessel for placing of MMP members as licensed deck officers aboard the vessel, for recognition of MMP and for a collective bargaining agreement.

The second vessel is the M/V Sugar Islander. This ship is owned by Bankers Trust Company and time chartered to California and Hawaiian Sugar Company. A bareboat charter on the vessel is held by Pyramid Sugar Transport, Inc. which crews and operates the vessel. Pyramid is a party to a collective bargaining agreement with District 2 Marine Engineers Beneficial Association-Associated

Maritime Officers, AFL-CIO which represents the licensed marine officers aboard the vessel.

In September, 1973, and January 1974, MMP picketed the M/V Sugar Islander at New Orleans and Reserve, Louisiana. The first picket sign stated that the M/V Sugar Islander was "unfair" to MMP and the second referred to the deck officers aboard the vessel working under lower standards than deck officers represented by MMP. The vessel was also picketed on two other occasions.

It is undisputed that the licensed deck officers aboard these vessels are supervisors within the meaning of the National Labor Relations Act. They are empowered by the owners or operators of each vessel to adjust the grievances of the unlicensed seamen who are represented by the Seafarers International Union (SIU). SIU's collective bargaining agreements with Westchester and Pyramid provide for the processing of the grievances of unlicensed personnel by the licensed deck officers aboard the vessel and the licensed deck officers are authorized and empowered to resolve such grievances.

Westchester, Pyramid and California and Hawaiian Sugar Company each filed unfair labor practice charges against MMP with the National Labor Relations Board alleging a violation of Section 8(b)(1)(B) of the Act. A consolidated complaint was issued and hearings were held before an Administrative Law Judge. He found that the object of the picketing was to force these employers to replace their MEBA represented supervisory licensed deck officers with members of MMP and held that picketing for such purpose fell within the proscription of Section 8(b)(1)(B) of the Act (Petition, pages 30a-75a). The National

Labor Relations Board affirmed the Administrative Law Judge's holding and further found that MMP's action in seeking recognition as the collective bargaining representative of the licensed deck officers, in seeking a collective bargaining agreement covering licensed deck officers and in seeking application of its contract standards to the licensed deck officers abroad the vessels was also in violation of Section 8(b)(1)(B) of the Act.*

The Court of Appeals for the Fifth Circuit affirmed the Board's finding of a Section 8(b)(1)(B) violation by MMP. Like the Board, it held that it was a violation of Section 8(b)(1)(B) for MMP to picket these ships for the object of (1) replacing MEBA deck officers with MMP deck officers, (2) forcing these employers to recognize MMP as the collective bargaining representative of the licensed deck officers, (3) forcing these employers to enter into a collective bargaining agreement with MMP, or (4) forcing these employers to apply so-called MMP labor standards to these vessels. The Court of Appeals relied upon the decision of the Court of Appeals for the District of Columbia Circuit in *International Organization of Masters, Mates and Pilots* v. *NLRB,* 486 F.2d 1271 (D.C. Cir. 1973), *cert. den.,* 416 U.S. 956 (1974). This Petition followed.

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* In its Petition to this Court, MMP makes frequent reference to the so-called substandard manning of a Master and three mates contained in the MEBA collective bargaining agreements covering these vessels. MMP neglects to mention that this complement of licensed deck officers has been approved by the United States Coast Guard for these vessels and that the Maritime Administration of the U.S. Department of Commerce has granted subsidy for the operation of these vessels only upon the basis of such a complement of a Master and three mates (Petition, pages 42a, 43a, fn. 11).

III. Reasons Why the Writ Should Not Be Granted

Intervenors submit that the decision of the National Labor Relations Board and its enforcement by the Court of Appeals were correct. No important question of statutory interpretation is presented by this Petition.

This Court has repeatedly emphasized the Board's expertise in applying the provisions of the National Labor Relations Act to the complexities of industrial life. *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963); *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941). This Court has recently affirmed the Board's "responsibility to adapt the Act to changing patterns of industrial life." *NLRB* v. *Weingarten*, 420 U.S. 251, 266 (1975).

Section 8(b)(1)(B) of the Act, 29 U.S.C. 157(b)(1)(B), provides that it is an unfair labor practice for a labor organization to restrain or coerce an employer

> in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

MMP's activities fall squarely within the confines of this statutory proscription. The purpose of MMP's picketing was to pressure Westchester and Pyramid to violate their contract with MEBA, to discharge the Master and licensed deck officers aboard the vessels and to employ MMP's members as licensed deck officers under a collective bargaining agreement with MMP.

The statute makes it an unfair labor practice for a labor organization to restrain or coerce an employer "in the selection of his representatives for the purpose of . . . the adjustment of grievances." The licensed deck officers aboard these vessels are representatives of the employer for purposes of the adjustment of grievances. They resolve the problems and grievances of non-supervisory unlicensed personnel and are authorized to do so by their employer. MMP's entire course of conduct, as to these vessels, was directed towards coercing Westchester and Pyramid in the selection of their licensed deck officers who are their representatives for purposes of adjusting grievances.

MMP argues at length in its Petition that Section 8(b)(1)(B) of the Act was never intended to prohibit a union which represents supervisors from engaging in picketing or other activities to protect or promote the interests of its supervisory membership. It points to the adverse effect upon MMP and to unrelated excerpts from the legislative history. The difficulty with its entire argument, aside from its previous rejection by the Board and the Court of Appeals for the District of Columbia, is that MMP's conduct squarely runs afoul of the express and specific provisions of the statute. Section 8(b)(1)(B) makes it an unfair labor practice for a labor organization to restrain or coerce an employer in the selection of his representatives who adjust grievances. MMP has clearly sought to restrain and coerce Westchester and Pyramid in their selection of licensed deck officers, who are the representatives of these employers engaged in the adjustment of grievances.

The Board considered and rejected MMP's argument. It said:

"We also find no merit in Respondent's argument that Section 8(b)(1)(B) was not intended to prohibit a union, which represents supervisors, from engaging in picketing solely to protect and improve the wages, hours, and working conditions of its members, and in particular to prevent the erosion of labor standards which Respondent has established over years of collective bargaining, and that Congress did not intend to prohibit picketing for the kinds of objectives which Respondent was pursuing here; i.e., recognition and/or a collective bargaining agreement. In other words, Respondent argues that Section 8(b)(1)(B) was designed only to prohibit a union from seeking to interfere with the employer's literal 'selection' of his 8(b)(1)(B) representatives. This argument is contrary to both the facts and the law."

The Court of Appeals for the Fifth Circuit adopted the Board's analysis. Judge Ainsworth, speaking for the Court, said:

"Implicit in section 8(b)(1)(B) is the congressional judgment, which surfaces explicity in another section of the Act, see 29 U.S.C. §164(a), that relations between an employer and its supervisory personnel should be insulated in full measure from coercive efforts by a labor union. Thus, a union violates section 8(b)(1)(B) if it strikes to force an employer to hire only union members as foremen, See *International Typographical Union Local 28* v. *NLRB,* 278 F.2d 6 (1 Cir. 1960), aff'd by an equally divided Court, 365 U.S. 705, 81 S.Ct. 855, 6 L.Ed. 2d 36 (1961), and the employer may demand with impunity that supervisory personnel neither retain their union membership not

participate in any way in union affairs. See *Beasley* v. *Food Fair of North Carolina,* 416 U.S. 653, 661-662, 94 S.Ct. 2023, 40 L.Ed. 2d 443 (1974). A crucial feature of the employer's prerogative to demand the complete loyalty of its supervisory personnel is the concomitant right to designate as its representatives for the adjustment of grievances those persons whom it pleases. Indeed, the employer's section 8(b)(1)(B) decision can be based, permissibly, on reasons completely divorced from the grievance adjusting abilities of the different contenders for supervisory positions. The employers in the instant case, Westchester and Pyramid, were free to designate MEBA as the representative for licensed deck officers on the Ultramar and the Sugar Islander in the belief that the MEBA contract, with its reduced manning requirement and other features, was more economical that the standard MMP contract and reflected an understanding by the MEBA hierarchy of the precarious competitive position of the United States Merchant Marine. Notwithstanding the difficulties involved in a post hoc reconstruction of the employer's reasons for selecting a particular representative, see *Marine & Markting, supra* at 1275, section 8(b)(1)(B) secures to the employer the unfettered right to select supervisory personnel, and its grounds for selection are not subject to challenge in defense of a charged violation of that provision." (Petition, pages 10a-11a)

The express statutory language of Section 8(b)(1)(B) shows that Congress has proscribed exactly the kind of conduct that took place in this case. The specific wording of the statutory prohibition condemns the coercion of an

employer, by picketing or otherwise, in the selection of his grievance adjusting supervisors. The picketing of Westchester and Pyramid to require these concerns to employ MMP members as supervisory grievance adjusters is expressly proscribed by Section 8(b)(1)(B).

MMP's attempted reference to legislative history does not provide any basis for this Court's consideration of this matter. As the Court of Appeals for the District of Columbia said in *Marine and Marketing, supra,* it may well be that Congress did not address itself to the specific problem involved here since it assumed that supervisors would only be part of an organization composed exclusively of supervisors and not part of a "labor organization" within the meaning of the Act. 486 F.2d at page 1274. But Congress did not create the exception to Section 8(b)(1)(B) which MMP asked the Board and the Court below to create. There is no basis for this Court to review these entirely proper determinations.*

But MMP's Petition contends that this Court's decision in *Forida Power & Light Co.* v. *International Brotherhood of Electrical Workers,* 417 U.S. 790 (1974) changes the basis for the statutory interpretation of the Board and the courts which have considered this problem. MMP states that review by this Court is necessary to clarify the scope and meaning of Section 8(b)(1)(B) as interpreted and applied in *Florida Power.* We submit that such a contention is without merit.

In *Florida Power,* a union had disciplined supervisors for crossing its picket line and performing bargaining unit

* The Board also found MMP to have violated Section 8(b)(1)(B) of the Act by similar conduct in *International Organization of Masters, Mates and Pilots (Cove Tankers, Inc.),* 224 NLRB No. 206 (1976).

work. The Board found a violation of Section 8(b)(1)(B). The Court of Appeals for the District of Columbia reversed and this Court affirmed the reversal of the Board's finding of a violation of the Act.

This Court traced the decisional history of the interpretation of Section 8(b)(1)(B). It referred to the Board's prior finding of a violation of that section in the attempt by a union to influence the manner in which a supervisor performed his supervisory functions. But the Court rejected the Board's attempt to extend that doctrine to forbid the discipline of supervisors for the performance of bargaining unit work during a strike.

This Court referred to Section 8(b)(1)(B) as follows:

> Both the language and the legislative history of §8(b)(1)(B) reflect a clearly focussed congressional concern with the protection of employers in the selection of representatives to engage in two particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances. By its terms, the statute proscribes only union restraint or coercion of an employer 'in the selection of his representatives for purposes of collective bargaining or the adjustment of grievances,' and the legislative history makes clear that in enacting the provision Congress was exclusively concerned with union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment. 417 US at page 803.

The Court's holding in *Florida Power* is succinctly set forth as follows:

> Nowhere in the legislative history is there to be found any implication that Congress sought to extend protection to the employer from union restraint or coercion when engaged in any activity other than the selection of its representatives for the purposes of collective bargaining and grievance adjustment. The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of §8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing that duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer. 417 US at pages 804, 805.

The issue in the instant case is completely different from that present in *Florida Power*. Here, MMP restrained and coerced Westchester and Pyramid in their selection of their licensed deck officers who are their representatives for purposes of grievance adjustment. MMP's activity was directed at requiring these employers to discharge their licensed deck officers and substitute members of MMP for them. Its picketing was aimed at causing these employers to select different representatives for purposes of grievance adjustment. Such conduct is squarely proscribed by Section 8(b)(1)(B) of the Act. *Florida Power* has no effect upon the issues involved here. That case concerned a completely different problem—the discipline of a supervisor for crossing a picket line and performing bargaining unit work. It has no applicability to the instant case.*

* Interestingly, MMP sees a conflict between the principle established in the instant case and *Florida Power* even though the Court of Appeals for the District of Columbia Circuit which decided *Florida Power* and *Marine and Marketing* saw no such conflict. In *Marine and Marketing*, Judge Wright and Judge Mackinnon formed the majority. In *Florida Power* Judge Wright wrote the majority opinion for the Court of Appeals and Judge Mackinnon dissented. Obviously, Judge Wright, who was in the majority in both *Marine and Marketing* and *Florida Power* saw no inconsistency between the holdings in these two cases and Judge Mackinnon's dissent in *Florida Power* was on completely different and unrelated grounds.

The Court of Appeals for the Fifth Circuit saw no inconsistency between its decision in the instant case and *Florida Power*. Speaking for the Court, Judge Ainsworth said that the Court did not read *Florida Power* "as impugning either the reasoning of the D.C. Circuit in *Marine & Marketing* or the result that we reach here." (Petition, page 11a). The Court pointed out that not only were there factual differences between the instant case and *Florida Power*, but also

> the union coercion in the instant case was directed at the employers, Westchester and Pyramid, themselves; the disciplinary proceedings in *Florida Power & Light* amounted to indirect coercion of the employer at best. When the union coercion called into question is applied directly to the employer, the Board is correct in enforcing the statute to its literal limit, which clearly encompasses picketing for replacement purposes. (Petition, page 12a)

Subsequent to *Florida Power*, the Board has found that a union violated Section 8(b)(1)(B) by striking to secure the reappointment of an assistant foreman who was an employer representative for purposes of adjusting grievances. It held that this section proscribed "the right to dictate to an employer the selection of a particular supervisor." *Laborers International Union of North America, Local 478*, 204 NLRB No. 32 (1973), enforced, *Laborers Lo-*

cal 478 v. *NLRB*, 503 F.2d 192 (D.C. Cir. 1974). See also *Sheet Metal Workers International Association, Local Union No. 17 (George Koch Sons Inc.)*, 197 NLRB 166 (1972), enforced *NLRB* v. *Sheet Metal Workers International Association*, 502 F.2d 1159 (1st Cir. 1973), *cert den.* 416 US 904 (1974).

IV. Conclusion

This case does not raise any serious statutory or policy question requiring review by this Court. The National Labor Relations Board has consistently interpreted the statute so as to proscribe conduct of the type engaged in by MMP here and its interpretation has been upheld by the courts. There is no conflict among the Courts of Appeals and this Court's Decision in *Florida Power* raises no question as to the validity of these prior holdings. The Petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1686

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief for California and Hawaiian Sugar Company, Westchester Marine Shipping Co., Inc., and Pyramid Sugar Transport, Inc. in Opposition

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Brief for California and Hawaiian Sugar Company, Westchester Marine Shipping Co., Inc., and Pyramid Sugar Transport, Inc. in Opposition

Respondents California and Hawaiian Sugar Company (C&H), Westchester Marine Shipping Co., Inc. (Westchester) and Pyramid Sugar Transport, Inc. (Pyramid) oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 539 F.2d 554 and reprinted in Pet. App. 1a-14a. The Decision and Order of the National Labor Relations Board, including the Decision of the administrative Law Judge, are reported at 219 NLRB 26 and reprinted in Pet. App. 19a-75a.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. B) was entered on October 19, 1976, and petitioner's petition for rehearing was denied on February 3, 1977 (Pet. App. C). By an order dated April 25, 1977, Mr. Justice Powell extended the time for filing a petition for certiorari to and including June 1, 1977. This Court's jurisdiction to review the judgment below is based on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the International Organization of Masters, Mates and Pilots, Marine Division, International Longshoremen's Association. AFL-CIO (the MM&P) violated Section 8(b)(1)(B) of the National Labor Relations Act by picketing the M/V SUGAR ISLANDER and the S/S ULTRAMAR in order to force the employers to replace their present licensed deck officers with deck officers who are members of the non-incumbent MM&P.[1]

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1. In framing the questions presented herein, the MM&P suggests that, since 97% of its members are supervisors (and therefore not statutory "employees") and since its conduct in this case was perpetrated solely in the interest of its supervisor-members, Section 8(b)(1)(B) has no application whatever. These suggestions are nothing more than a masquerade for two contentions which were made and resoundingly refuted in the proceedings below: (1) that the MM&P is not a "labor organization" within the meaning of the Act; and (2) that the picketing was not unlawful because it was carried out by something called the "Offshore Division" of the MM&P, an administrative subdivision which petitioner claimed was an independent, separate entity composed only of supervisor members.

The first of these contentions has been so often rejected that to raise it again seems to us to be specious. For cases in which the MM&P has been held to be a labor organization for purposes of one section of the Act or another see: *Danielson v. Masters, Mates and Pilots*, 521 F.2d 747, 89 LRRM 2564 (2nd Cir. 1975); *International Organization of Masters, Mates and Pilots (Marine and Marketing Int'l. Corp.)*, 197 NLRB 400 (1972); *enf'd., Int'l Org. of Masters, Mates & Pilots, et al. v. NLRB*, 486 F.2d 1271 (D.C. Cir. 1973); *cert. den.* 416 U.S. 956, 85 LRRM 3018 (1974); *Dente v. Int'l Org. of Masters, Mates and Pilots*, 492 F.2d 10 (9th Cir. 1973); *Lykes Bros. Steamship Co.*, 197 NLRB 363, 80 LRRM 1813 (1972); *Compton v. Int'l Org. of Masters, Mates & Pilots*, 78 LRRM 2598 (D.C. Puerto Rico 1971); *Int'l Org. of Masters, Mates & Pilots of America, Inc. (Chicago Calumet Stevedoring Co., Inc.)* 144 NLRB 1172 (1963) (Supplemental decision); *enf'd., Int'l Org. of Masters, Mates & Pilots v. NLRB*, 351 F.2d 771 (D.C. Cir. 1965); *National Maritime Union (Standard Oil Co.)*, 121 NLRB 208 (1958); *enf'd., National Marine Engineers v. NLRB*, 274 F.2d 167, 45 LRRM 2499 (2nd Cir. 1960); *Madden v. Int'l Org. of Masters, Mates and Pilots*, 259 F.2d 312 (7th Cir. 1958); *Douds v. Seafarers International Union, et al.*, 148 F.Supp. 953 (E.D.N.Y. 1957); *J. W. Banta Towing Co., Inc.*, 116 NLRB 1787 (1956); *Wilson Transit Co.*, 80 NLRB 1476 (1948).

The second contention, i.e., the separateness of the Offshore Division, fell under the weight of overwhelming evidence that the Offshore Division is an integral part of the MM&P and that the picketing was decided upon, ordered and monitored by the parent organization, the MM&P. (Pet.App.8a; 65a-68a, *passim*).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* are set forth at Pet. 3-4.

STATEMENT OF THE CASE

The jurisdiction of the Court of Appeals was invoked by the MM&P on a petition under 29 U.S.C. § 160(f) to review the Decision and Order of the Board, and by the Board on a cross-petition for enforcement under 29 U.S.C. § 160(e). C&H, Westchester and Pyramid, upon timely application therefor, were granted leave to intervene.

A. The Relationship of the Parties Respondent and the Vessels Involved.

C&H is the time charterer of the M/V SUGAR ISLANDER from Pyramid; Pyramid, in turn, is the bareboat charterer of the vessel and it mans and operates the ship for the account of C&H. The SUGAR ISLANDER was delivered to Pyramid in August 1973, at which time Pyramid entered into a collective bargaining agreement with the Marine Engineers Beneficial Association (MEBA) for the manning of the vessel with licensed deck officers[2] and engineers.

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2. These deck officers were members of the incumbent union, MEBA, and were the persons selected by the employers as the supervisors and grievance-adjustors for the unlicensed crews.

Westchester, under contract with the bareboat charterer, Aries Marine Shipping Co., Inc., is the crewing and husbanding agent for the S/S ULTRAMAR. The ULTRAMAR was also delivered in August 1973, at which time Westchester and MEBA also entered into a collective bargaining agreement covering the licensed deck officers and engineers.

B. The Essential Facts.

Long before the construction of the SUGAR ISLANDER and the ULTRAMAR was completed, the MM&P had initiated efforts to secure the manning of the two vessels with MM&P deck officers. These efforts were resisted and the persons ultimately responsible for manning the ships chose instead to enter into labor contracts with MEBA. (Pet. 7; App. 3a-5a). The reason, plainly stated, is that MEBA was able to offer an economically more favorable and unified labor relations package.

The SUGAR ISLANDER and the ULTRAMAR were at the time of their launching the most revolutionary American flag ships afloat.[3] The manning level for deck officers aboard both ships had been certified by the U.S. Coast Guard at one master and three mates, and there was therefore no need for the employers to bear the expense of larger complements of deck officers. MEBA offered a standard contract which called for a deck officer manning scale of a master and three mates. The MM&P rule, however, required that there be a master and *four* mates. Moreover, because of an alliance between MEBA and the Seafarers International Union (SIU), which represents the unlicensed crews, MEBA was able to offer "top-to-bottom" manning. This is an attractive feature, because the affinity between MEBA and SIU

3. The SUGAR ISLANDER was the only American built vessel with a completely automated engine room; it was the first vessel certified by the U.S. Coast Guard for unattended engine room operations. (Pet.App. 4a). The ULTRAMAR was the first American built ship capable of carrying such diverse cargoes as oil, bulk cargo and ore. (Pet.App. 3a).

tends to give stability to labor relations aboard the vessels. (Pet. 3a; 42a; fn. 9; 51a).

The MM&P and MEBA have in recent years been engaged in an escalating dispute over the representation of licensed deck officers, the MM&P proclaiming its inviolate, exclusive "right" to represent them, and MEBA asserting that they are fair game. Attempts to settle the dispute by legitimate means[4] have failed to produce results satisfactory to MM&P. So, in its frustration that union has turned to illegitimate means, and at various times between August 1973 and January 1974, and in various ports, the MM&P picketed the SUGAR ISLANDER and the ULTRAMAR and her sister ship the ULTRASEA, effecting on each occasion a complete cessation of the operation of the ships. The MM&P made no bones about it: its purpose was to force the employers to enter into collective bargaining agreements with the MM&P and to replace the MEBA deck officers[5] with its own members.[6]

In January 1974 C&H, Pyramid and Westchester filed unfair labor practice charges against the MM&P; the Board, and subsequently the Fifth Circuit, found that *in all respects* the MM&P's picketing had been violative of Section 8(b)(1)(B) of the Act.[7]

4. For example, Article XX of the AFL-CIO Constitution provides for internal arbitral machinery for processing such disputes, and proceedings thereunder have actually been undertaken, albeit unsuccessful from MM&P's point of view.

5. Who, it must be remembered, were the supervisors who had been *selected* by Pyramid and Westchester and who were the persons aboard the vessels who adjust grievances. (Pet. App. 56a-57a).

6. *Vide* the remarks of Thomas F. O'Callaghan, the then International President of the MM&P: ". . . I wanted a contract with them. . . .[I] wanted members of the Masters, Mates and Pilots serving aboard those vessels as licensed deck officers." (Pet. App. 50a).

7. At Pet. 7, petitioner makes the following *incorrect* statement: ". . . It is undisputed that the picketing had four separate and distinct objectives. . . ." To the contrary, both the Board and the Fifth Circuit found that, in view of the coercive means utilized and the fundamental replacement object, the remaining objects of the picketing were indistinguishable one from the other. (Pet. App. 12a-13a; 20a-21a, fn. 2).

ARGUMENT

A. The Decisions Below in No Way Conflict with the Supreme Court's Decision in Florida Power.[8]

Despite petitioner's efforts to stretch the principles involved (Pet. 10-15, *passim*), there is not even the remotest conflict between the decisions below and this Court's decision in *Florida Power*.[9] The cases present entirely different questions.

The essential ingredients of *Florida Power* and *American Broadcasting* (fn. 9, *supra*) are these:

1. discipline;
2. imposed by an *incumbent* union;
3. against supervisor-members;
4. who perform work;
5. during a lawful strike.

The central question in *those* cases is whether the employer's right to demand loyalty from its 8(b)(1)(B) representatives is outweighed by the union's right to preserve strike solidarity and to demand loyalty from its members.

In contrast, the elements of the present case are:

1. a *non-incumbent* union (MM&P);
2. picketing employers with whom it has no bargaining relationship;
3. to *force* the employers—
   a. to terminate their bargaining relationships with the incumbent union (MEBA);
   b. to execute a collective bargaining agreement with the non-incumbent union (MM&P);

8. *Florida Power & Light Co. v. International Brotherhood of Electrical Workers*, 417 U.S. 790 (1974).

9. Nor, for that matter, will any purpose be served in granting certiorari in the present case just so it can be considered together with *American Broadcasting Company, Inc. v. NLRB*, 93 L.R.R.M. 2958 (2nd Cir. 1976), *certiorari granted*, Nos. 76-1121, 76-1153, 76-1162, April 25, 1976. (Pet. 17). The factual and legal issues are entirely different.

   c. to terminate the employment of their selected 8(b)(1)(B) representatives (members of MEBA); and
   d. to replace those persons with 8(b)(1)(B) representatives who are members of the non-incumbent union (MM&P).[10]

There is in the present case no question of union discipline or contending loyalties and, therefore, no way that the rules enunciated in *Florida Power*, or those which will emerge when the Court decides *American Broadcasting*, can be applied here. And, thus, there is no conflict.

B. The Purposes of the National Labor Relations Act Will Best Be Served by Allowing the Decision of the Fifth Circuit to Stand Unmolested.

Petitioner here observes that it was not seeking to replace the employers' deck officers because of any objection to or interest in the way in which those deck officers performed their "grievance-adjusting functions." "It was merely seeking to obtain employment for its own members." (Pet. 13). This is nothing more than another way of saying that petitioner wants to displace MEBA-represented personnel with its own, who will then adjust grievances.

Let us suppose that the vessel owners capitulate, oust MEBA, and install MM&P. In the normal course of events, then, MEBA will establish a picket line. MEBA officers will observe that they really

10. This conduct, of course, brings the case squarely within the literal purview of Section 8(b)(1)(B). Petitioner does not dispute this. Indeed, in its reply brief in the Fifth Circuit the MM&P stated: "Both the Board and the intervenors emphasize the finding, *which we do not contest*, that one object of the picketing was to force the employers to replace their MEBA deck officers with MM&P deck officers. . . .

"While the literal language of the statute can be read as prohibiting picketing for this particular object . . . [w]e urge the Court . . . to look beyond the literal language. . . ." (Emphasis added). (MM&P Reply Br., 2-3).

are not critical of the way MM&P-represented officers handle grievances. No, not at all. All MEBA seeks, in this new situation, is "employment for its own members."

In short, the vessels will be inoperative whether manned by MM&P or by MEBA, since one union or the other will be always seeking "employment for its own members," and will emphasize this quest with a picket line.[11]

Petitioner dwells at length upon Congressional history. It decides, finally, that the "clear intent of the Congress . . . was to adopt a policy of neutrality" toward "strikes and picketing by supervisors." Even if this were so, and it is not, the Congress certainly *did not* intend a stand-down of American flag merchant shipping at the pleasure of two labor organizations.

What Congress *did* intend is stated in the preamble to the Act:

> *"It is the purpose and policy of this Act in order to promote the full flow of commerce,* to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, *to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other,* to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, *to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.* (Emphasis added.) (29 U.S.C. Sec. 141(b)).

Those purposes can best be carried out by letting the decision of the Fifth Circuit stand unmolested.

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11. To be sure, there are additional consequences. As is apparent from its full legal name (*supra*), the MM&P has an affiliation with the International Longshoremen's Association, whose members will refuse to handle cargo while an MM&P picket line is present. By the same token, the SIU, which represents unlicensed crewmen and which has an alliance with MEBA, will honor the picket lines when it is MEBA's turn to strike.

CONCLUSION

The petition should not be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1686

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.

The brief for the National Labor Relations Board argues that the decision below, insofar as it held that it was unlawful for petitioner to picket to obtain deck officer jobs for its members,

> "simply followed a long line of cases holding that a labor organization violates Section 8(b)(1)(B) of the Act when it strikes, pickets, or engages in other coercive conduct in order to induce an employer

> to select bargaining or grievance adjustment representatives whom it does not want, or to forego representation by representatives of its own choosing." (NLRB Br. 9, footnote omitted.)

The cases cited in support of this proposition (*id.* at n.3), however, all involved efforts by a union which represented an employer's "employees" to influence or control the employer's labor-relations policies by dictating the choice of the representatives through whom the employer formulated or implemented such policies. This case presents a quite different situation. The union here did not represent or seek to represent the "employees" of the employers involved. Nor was it interested in influencing or controlling the employers' labor-relations policies toward their employees. Its interest, rather, was in obtaining employment for its own members, who are "supervisors" within the meaning of the Act. None of the cases relied on by the Board even address the question of whether Section 8(b)(1)(B) is applicable in such a situation.

The Board also asserts that the decision below on this issue is "in accord with the legislative history of the Act." (NLRB Br. 9.) We respectfully disagree. As Judge Bazelon stated in the only previous case which has presented this issue:

> "The Board's decision in this case restricts the power of supervisors to resort to self-help—a power that Congress intended them to retain—so long as they belong to a union containing statutory employees and so long as their positions involve collective bargaining or grievance adjustment functions. In effect, it places a tax on supervisors' right to remain members of employee unions, a right that Section 14(a) specifically preserves.
>
> "I find nothing in the legislative history of Section 8(b)(1)(B) to support, or even favor, a conclusion that Congress intended it so to restrict supervisors' rights. On the contrary, the legislative history makes

> clear that Congress was concerned with an entirely different problem. The Section was intended to prevent efforts by *employee unions* to coerce employers into choosing, as collective bargaining and grievance adjustment representatives, persons sympathetic to the union's rank-and-file members, rather than persons loyal to the employer. Consistently with this purpose, the Board has extended the Section to include employee union attempts, by discipline or otherwise, to force its supervisor members to perform collective bargaining or grievance adjustment functions in a manner favorable to the union. Before this case, however, the Board has never attempted to apply Section 8(b)(1)(B) to a union that neither represented, nor aspired to represent, the employer's rank-and-file employees. And the reason for this is clear: in such circumstances, the purpose that Congress intended the Section to achieve is simply not implicated." *International Organization of Masters, Mates and Pilots* v. *NLRB*, 486 F.2d 1271, 1277-78 (D.C. Cir. 1973) (dissenting opinion), *cert. denied*, 416 U.S. 956 (1974). (Emphasis in original; footnotes omitted.)

To be sure, this was a dissenting opinion, but it is certainly more persuasive than the Board's *ipse dixit*. Moreover, we believe Judge Bazelon's reading of the legislative history is supported by this Court's subsequent decision in *Florida Power & Light Co.* v. *International B'hd of Elec. Workers*, 417 U.S. 790 (1974).* In any event, the question of whether Section 8(b)(1)(B) was intended to limit the

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* Both the Board and the other respondents argue that *Florida Power* involved different facts and a different issue than this case. We have never contended, of course, that the facts of *Florida Power* were similar to the facts of the present case, nor have we contended that the issues in the two cases are the same. What we do contend is that the result reached in the present case—albeit on different facts and a different issue—is inconsistent with this Court's analysis in *Florida Power* of the meaning and purpose of Section 8(b)(1)(B). None of the respondents has answered this argument.

power of supervisors to engage in concerted activities for their own mutual aid and protection is certainly not settled, as the Board's brief suggests. We submit that this question is of sufficient importance to warrant plenary consideration by this Court.

II.

As we pointed out in the petition, the decision below did not merely hold that the picketing in this case was unlawful only insofar as it sought to force the employers to hire petitioner's members as deck officers. It also held that the picketing was unlawful insofar as its purposes were (1) to secure recognition of petitioner as the bargaining representative of the employers' deck officers, (2) to obtain a collective bargaining agreement covering such deck officers, and (3) to induce the employers to apply to their deck officers the terms and conditions of employment which prevail under petitioner's collective bargaining agreements with other employers. The Board's brief attempts in various ways to suggest that these aspects of the decision are tied to the particular facts of this case, but it is clear that the decision is not so limited.

First, the Board argues that because "collective agreements in this industry typically provide that the employer will hire only members of the contracting union . . ., the employers would have been required to replace all the MEBA officers if MMP had succeeded in obtaining a contract covering the licensed deck officers on these vessels." (NLRB Br. 12.) The Board's order, however, does not merely prohibit MMP from picketing for a contract which would require the employers to hire MMP members. It prohibits picketing for *any* contract, including a contract which would permit the employers to retain their existing complement of deck officers. (Pet. 25a-26a.) The order even prohibits MMP from picketing merely to obtain recognition as the collective bargaining representative of

such desk officers, or to induce the employers to apply to those deck officers the terms and conditions of employment which MMP has established in its contracts with other employers. (*Ibid.*)

MMP would obviously have an interest in obtaining recognition and a collective bargaining agreement even if it could not require the employers to hire its members, since one of its principal concerns in this case was to prevent these employers from undercutting the labor standards which MMP has established through years of collective bargaining in this industry. The decision in this case prohibits it from pursuing even this limited goal.

The Board also argues that "MMP's picketing for any or all of the proscribed objects would coerce the employers in the selection of their Section 8(b)(1)(B) representatives by warning them not to select any persons except those who would work on MMP's terms." (NLRB Br. 12.) This argument, of course, would be equally applicable in *any* situation in which MMP might use peaceful economic pressure against *any* employer to obtain *any* concession with respect to the wages, hours and working conditions of deck officers. If Section 8(b)(1)(B) were to be construed that broadly, MMP would be utterly unable to function effectively as a union representing deck officers.

The Board also argues that the decision in this case would not affect picketing with respect to supervisors "who do not possess grievance-adjustment or collective-bargaining authority." (NLRB Br. 13.) This argument, however, hardly narrows the scope of the Board's holding in this case, since virtually every supervisor has at least *some* grievance-handling responsibilities. Moreover, the Board has sometimes held that even a supervisor who has never performed grievance handling is entitled to the protection of Section 8(b)(1)(B) since he may be required to do so in the future. E.g., *Toledo Locals Nos. 15-P and 272 (Toledo Blade Co.)*, 175 N.L.R.B. 1072, 1078-79

(1969), *enforced*, 437 F.2d 55 (6th Cir. 1971); *Detroit Newspaper Printing Pressmen's Union (Detroit Free Press)*, 192 N.L.R.B. 106, 110 (1971). The clear trend of Board decisions is to hold that all supervisors are covered by Section 8(b)(1)(B).

Finally, the Board asserts that the present decision "does not preclude a union from, for example, picketing to urge higher wages for supervisors it already represents." (NLRB Br. 13.) This argument is disingenuous, for the decision of both the Board (Pet.App. 24a) and the court below (Pet.App. 14a) specifically relied upon a case in which the Board squarely held that a union *had* violated Section 8(b)(1)(B) by "picketing to urge higher wages for [a supervisor] it already represent[ed]." *Sheet Metal Workers Local 17 (George Koch Sons, Inc.)*, 199 N.L.R.B. 166 (1972), *enforced*, 502 F.2d 1159 (1st Cir. 1973), *cert. denied*, 416 U.S. 904 (1974). The employer in that case had a contract with the union which covered both employees and certain supervisors. In direct violation of that agreement, the employer had paid a particular supervisor less than the contractual wage rate, had refused to pay him overtime, and had also failed to make certain welfare and pension contributions required by the contract. When the union discovered these infractions, it fined the supervisor (who was a union member) for acquiescing in the contract violations, and it struck the employer to compel him to make the wage and other payments required by the contract. The Board held that both the fine and the strike violated Section 8(b)(1)(B):

> "If an employer is to be free from union coercion in the selection of persons who are to serve the employer as its representatives, then surely the employer must be free from union coercion in the matter of setting the terms of such representatives' employment. Thus, to fine one who agrees to serve as an employer's representative solely because he and the employer agreed upon terms and conditions of em-

> ployment which the union may find objectionable must necessarily have an inhibiting effect—and indeed a coercive effect —on the employer in his future selection of representatives . . . .
>
> " . . . . We think it equally clear that the work stoppages which were initiated by Respondent were for the purpose of requiring Koch to accede to the union-dictated terms and conditions of Ziltener's employment and thus coerced the Employer in the same manner as the fines levied on Ziltener himself, and we find such conduct on the part of the Union also to be violative of Section 8(b)(1)(B)." 199 N.L.R.B. at 167-68.

The reliance of both the Board and the court below on the above case demonstrates that the present decision is not narrowly limited to its particular facts, as the Board's brief suggests. Rather, it represents an interpretation of Section 8(b)(1)(B) which effectively prohibits virtually any concerted activities by or on behalf of supervisors. We submit that this reading of the statute is inconsistent both with its language and its legislative history, as well as with this Court's own interpretation of it in *Florida Power*, *supra*. In any event, the ramifications of the decision in this case are so far-reaching as to merit review by this Court.

CONCLUSION

For the reasons stated above and in the petition, the writ of certiorari should be granted.

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